The Arbitration of Faculty Status Disputes in Higher Education

Matthew W. Finkin

THE ARBITRATION OF FACULTY STATUS DISPUTES IN HIGHER EDUCATION†

by

*Matthew W. Finkin**

TABLE OF CONTENTS

I. INTRODUCTION

An important issue presented in the expanding engagement by college and university faculty members in collective bargaining has been the status of nonrenewal of appointment, denial of tenure or promotion, or the imposition of discipline under the grievance arbitration procedure of the collective agreement. Some observers simply see no place for the "intrusion" of an

† Copies of all unreported arbitration awards cited in this Article are on file with the library of the Southern Methodist University School of Law, except as otherwise indicated.

* A.B., Ohio Wesleyan University; LL.B., New York University Law School; LL.M., Yale Law School. Associate Professor of Law, Southern Methodist University School of Law. The author wishes to thank Merton C. Bernstein and Robert A.

off-campus judgment into the institution's internal decisional processes.[1] Some see no reason for disallowing review of the merits of such decisions;[2] others have struggled with establishing a system whereby arbitration corrects only procedurally deficient decisions, eschewing review of the merits.[3]

This Article outlines the differences between industrial assumptions and decisional processes in institutions of higher education and surveys the alternatives accommodating the grievance arbitration procedure to those processes. The Article also explores how arbitrators have dealt in practice with faculty status grievances under a variety of these approaches.[4] Tentative assessments of the awards are made and some suggestions are offered for accommodating arbitration to higher education.

II. ANATOMY OF THE PROBLEM

A. *Institutional Assumptions*

The "industrial model" is built on the assumption of management's right to make decisions and the bargaining agent's right to seek to subject them to the limitations or rules of the collective agreement.[5] Disputes arising under the

Gorman for their comments on different earlier drafts; errors and misperceptions are entirely the author's.

1. R. CARR & D. VAN EYCK, COLLECTIVE BARGAINING COMES TO THE CAMPUS 224-25 (1973); H. Levy, Academic Judgment and Grievance Arbitration in Higher Education, Academic Collective Bargaining Information Service, Special Report No. 20, at 8 (April 1975) ("A final decision on substantive matters arrived at by an individual arbitrator who is outside the [decisional] process appears at least, to undermine the principle of democratic self-governance and may be injurious to the institution's capacity for achieving public expectations.").

2. *See, e.g.*, Morand & Purcell, *Grievance and Arbitration Processing*, in COLLECTIVE BARGAINING IN HIGHER EDUCATION—THE DEVELOPING LAW 297, 315 (J. Vladeck & S. Vladeck eds. 1975) ("[t]he mysticism of the 'academic judgment' line of argument has established in higher education one of the last bastions of unaccountable management authority").

3. Summarized in Benewitz, *Contract Provisions and Procedures*, in J. Vladeck & S. Vladeck, *supra* note 2, at 275, and H. Levy, *supra* note 1; Ferguson & Bergan, *Grievance-Arbitration Procedures and Contract Administration*, 1 J. COLLEGE & U. LAW 371 (1974).

4. Most arbitration awards are unpublished and there is no single source which routinely publishes all awards in higher education. Accordingly, rather full accounts of the facts and reasoning will have to be supplied. The author has relied primarily on the American Arbitration Association's *Arbitration in the Schools*, through which noted awards are made available. The author would like to express his appreciation to Steven Vladeck, Esq., and to the United Federation of College Teachers, Local 1460, AFT, AFL-CIO, for making available awards in then Unit II (non-tenure eligible) of the City University of New York (CUNY), and to Woodley B. Osborne, Esq., of the American Association of University Professors, for making various awards under AAUP contracts available. Other attorneys and arbitrators have also been most kind in supplying awards in individual cases not noted in the AAA service. While this review is by no means comprehensive, the author believes it to be sufficiently representative for analytical purposes. [Editor's Note: Subsequent to the submission of this manuscript Professor June Weisberger's monograph appeared. J. Weisberger, Faculty Grievance Arbitration in Higher Education: Living with Collective Bargaining (Institute of Public Employment, New York State School of Industrial and Labor Relations, Monograph No. 5, Jan. 1976). The monograph deals primarily with the City University of New York (CUNY) and the State University of New York (SUNY). Where possible her observations have been noted. Fortunately, most of the CUNY awards she discusses also are discussed here.]

5. The "industrial model" is posited for analytical purposes since, as David Feller has pointed out, a counter structure of employee imposed work rules also has strong historical roots. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 724-25 (1973).

agreement are, in the vast majority of cases, submitted to arbitration, which supplies a device for policing the agreement's terms as well as for solving unresolved or unforeseen problems in that context. For example, decisions to hire, assign, promote, reward, or discipline are viewed archetypically as the province of management, although the collective agreement may subject those decisions to agreed-upon limitations. In an arbitration proceeding the threshold question is whether the collective agreement has in fact limited management's right to decide and, if so, to what extent.

This model stands in sharp contrast to the assumptions upon which faculty status decisions usually are made in higher education. In most institutions the responsibility for both the practical decisional standards and the initial decisions themselves lies primarily with the academic disciplinary or peer group. While the general criteria upon which the individual will be assessed may be established by institutional policy,[6] their application is tailored to the individual candidate and may be the result of a different weighting of each criterion by each of the faculty participants; the evaluation process may contemplate comparison with other candidates or with the available pool in the academic labor market. The recommendations of the disciplinary group are subject to administrative and, not infrequently, additional faculty review before final acceptance or rejection. That review assesses how well the department or school can support its recommendation and weighs that recommendation against the overall needs of the institution and the competing claims by other schools and departments.

The justification for this system of faculty participation is found in the purposes of the institution—primarily the acquisition, testing, and transmission of knowledge by specialized professionals. The professional status of the principals and their proximity to the day-to-day functioning of the institution yields a high degree of expertise which is brought to bear in faculty status decisions. In addition, peer participation, essentially a process of certification by the professional group, lends legitimacy to the decision and supplies a buffer against the intrusion of aprofessional considerations, *e.g.*, a negative judgment by an administrator or trustee in response to unconventional or unpopular expressions of the candidate.[7] In contrast to the

6. These criteria include, for example, completion of advanced study or the acquisition of professional experience, evidence of scholarship, classroom effectiveness, relevance of one's specialization to the current and projected needs of the program, and institutional or community service.

7. The founding statement on academic freedom in American higher education observed:

> A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions, the primary responsibility.
>
> . . .
>
> It is . . . inadmissible that the power of determining when departures from the requirements of the scientific spirit and method have occurred, should be vested in bodies not composed of members of the academic profession. Such bodies necessarily lack full competency to judge of those requirements; their intervention can never be exempt from the suspicion that it is dictated by other motives than zeal for the integrity of science; and it is, in any case, unsuitable to the dignity of a great profession that

assumptions governing blue collar industrial employment, the system of structured professional influence in faculty status decisions in higher education assumes first that management's practical authority to decide is shared with the faculty[8] and second that the correctness of the judgment rests largely on subjective assessments.[9]

The system of highly influential but technically non-binding professional judgments on faculty status does not entirely obviate the possibility of error or abuse either by the peer group itself or by the administration. In some institutions an internal institutional grievance procedure wholly apart from collective bargaining has been established. This procedure is usually controlled by the faculty but occasionally consists of both faculty and administration.[10] The grievance committee's review customarily is reserved to determining whether the grievant was given adequate or fair consideration and not whether it would agree or disagree with the result on the merits.[11] Similarly, the imposition of discipline is customarily determined by the

---

> the initial responsibility for the maintenance of its professional standards should not be in the hands of its own members.

The 1915 Declaration of Principles, in ACADEMIC FREEDOM AND TENURE 155, 163, 169 (L. Joughin ed. 1969).

8. Note, for example, one arbitrator's reasoning when confronted by an administration's argument denying responsibility for a negative decision generated by the faculty:

> Having adopted the format of unionism, college faculty members still may have much to learn from the prototypes of their relatively new-found type of organization. This dispute would seem utterly unreal to many trade unionists, for they would be loath to place themselves in the position of self-censure which their academic counterparts appear to have assumed with reference to their colleagues in their own union! In the final analysis though, a 'management,' or whatever it may be called, cannot avoid its intrinsic responsibilities. The final responsibility for hiring and firing, for retention and for non-retention, remains in the administration, and it cannot 'cop out,' as the saying goes, by contending that it turned this function over to 'the employees.'

Board of Junior College Dist. 508, 53 Lab. Arb. 530, 536 (1969) (Sembower, Arbitrator). There is an industrial analogy to the contrary when joint union-management participation in apprenticeship decisions substitutes for arbitration on the merits. *See* West Va. Pulp & Paper Co., 43 Lab. Arb. 35 (1964) (Abersold, Arbitrator). *See also* Gore Newspapers Co., 63 Lab. Arb. 538 (1974) (Turkus, Arbitrator); Aiken Indus., Inc., 58 Lab. Arb. 649 (1972) (Cole, Arbitrator).

9. Outside of higher education arbitrators have encountered similar difficulties when confronting decisions based on subjective assessments such as the musical judgment of a conductor in dismissing a member of a symphony orchestra, M. MOSCOW, LABOR RELATIONS IN THE PERFORMING ARTS 130 (1969), or the dismissal of a broadcast newsman on grounds of incompetence, Coulson, *What Has To Be Arbitrated in Broadcasting*, in BROADCASTING AND BARGAINING 85, 88 (A. Koenig ed. 1970). The complication added in higher education concerns the role of the faculty in generating the decision.

10. For a useful discussion see McConnell, *The Fractious Academy: A Canadian Approach to Dispute Resolution*, 3 J. LAW & EDUC. 233 (1974).

11. As a former chairman of such a committee in the University of California system explains:

> Similarly, in cases where tenure is denied, the committee would refuse to hear the case if the issue were put strictly in terms of academic judgment. If the department voted 5-4 against, but the evidence was such that another department might have voted 5-4 in favor, then presumably the vote could have been anything from 9-0 all the way to 0-9. If all a complaint involves is the allegation that the evidence could or even should have supported a different conclusion, there is no reason for the committee to become involved: why should it be thought more reliable in its judgment of academic matters than any other campus agency? Again, we would not take up the complaint unless the complainant could throw doubt on the fairness of the proceedings, and give us a good reason to suspect

governing board of the institution only after a hearing before a faculty committee. The recommendations of both grievance and hearing committees, however, are usually advisory. Whether the administration and governing board will concur in a hotly contested case is essentially a political matter to be determined by weighing the degree of prestige of the principals involved, the depth and extent of faculty sentiment, the probability of loss of leading faculty occasioned by the governing board's refusal to accept the faculty's position, the impact of negative publicity on the institution, the sentiment in other relevant constituencies of the institution such as students, alumni, and legislators, and, not inconceivably, the cogency of the faculty committee's reasoning. Arbitration presents itself as an alternative not to wholly unfettered managerial discretion, but to ad hoc institutional political activity.[12]

B. *The Dilemma of Arbitral Standards*

Whether it is necessary for a forum to be supplied for the adjudication of faculty status disputes must be determined first; that is, why such matters are not best dealt with through the internal processes just discussed. For a number of institutions, largely the better universities and leading liberal arts colleges, internal political suasion may well continue to prove satisfactory to remedy strongly challenged faculty status decisions.[13] However, the rather sudden shift in the academic labor market may have lessened the potential impact of such traditional internal devices in many institutions. Indeed, the movement toward collective bargaining often reflects anxiety at the lack of administrative responsiveness to faculty judgments. This situation is exacerbated in state institutions by the growing tendency toward statewide centralization and coordination which further removes the locus of decision-making

---

> that more had been involved than the mere exercise of professional judgment on the complainant's record.

Ellis, *Grievance Procedures: Real and Ideal*, in AVOIDING CONFLICT IN FACULTY PERSONNEL PRACTICES 63, 70 (R. Peairs ed. 1974).

12. Note the conclusion of a recent study: "In essence, the bureaucratic mechanisms of contract administration and the channeling and resolution of conflict they provide help regularize the political dynamics that occur in unionization and collective bargaining." F. KEMERER & J. BALDRIDGE, UNIONS ON CAMPUS 4 (1975). Professor Baldridge had earlier refined a "political" analysis of academic decision-making in his study of New York University. J. BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY (1971).

13. The comments of the Stanford University Chapter of the American Association of University Professors in proposing an internal grievance procedure for that institution noted:

> [A]s a practical matter, the [grievance] Panel will have the power to insure that its recommendations are taken seriously and that they will carry substantial weight with the administrative officers to whom they are made. At the same time, the proposed Faculty Grievance Procedure preserves to the administrative officers of the University necessary flexibility by not forcing them to adopt the Panel's recommendations in every case. Obviously refusal to follow or to be influenced by the recommendations of the Faculty Grievance Panel could not be carried to excess without destroying the harmony with the faculty that the University administration has sought and will no doubt continue to seek. At a University such as Stanford, there is every reason to believe that the recommendations of the faculty groups empowered to review faculty grievances will have substantial influence.

Stanford University, Campus Report, vol. 6, no. 35, at 11 (May 29, 1974).

from faculty influence.[14] Thus, the binding nature of the arbitral disposition is of significance to increasingly insecure faculty members.

An alternative to arbitration is judicial review. Outside the context of collective bargaining, disgruntled faculty are resorting increasingly to the courts to challenge faculty status decisions on constitutional,[15] contractual,[16] or statutory grounds.[17] Not surprisingly, the sporadic engagement of the judiciary has produced highly variegated case law.[18] Given this state of affairs, arbitration has a greater potential than the courts for producing decisions responsive to the needs of the institution, for the decisional standards are fashioned jointly by representatives of the administration and faculty, and they jointly select the decision-maker, presumably because of his special competence.[19] Moreover, arbitration is still relatively swifter and less expensive than a lawsuit. Thus, a successful arbitration system will to the extent labor boards or the judiciary defer to its decisions foster rather than intrude on institutional autonomy.

The requirements of such an arbitration system, however, are highly problematic. First, the operational role of the faculty in generating the decisions challenged must be accommodated. As one guidebook for faculty bargaining points out:

> The difficulty is that decisions which may become the subject of grievances are made, at least initially, by the faculty—frequently pursuant to the contract itself. The availability of a contractual grievance procedure and ultimately, arbitration, not only limits peer discretion as well as administrative discretion, but it may place the bargaining agent in the uncomfortable position of pursuing grievances against its own members.[20]

Second, and closely related, the highly subjective character of the challenged decision places an enormous stress on arbitral standards and on the arbitrators themselves.

Some collective agreements accordingly eschew arbitration altogether to resolve these kinds of disputes. For example, the collective agreement at

---

14. R. CARR & D. VAN EYCK, *supra* note 1; A. THOMPSON, AN INTRODUCTION TO COLLECTIVE BARGAINING IN HIGHER EDUCATION (1974); Finkin, Book Review, 123 U. PA. L. REV. 217 (1974).

15. In the public sector the law is clear that professors cannot be terminated for reasons violative of constitutional rights. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

16. In the private sector, where institutions are not subject to constitutional limitations, most of the recent litigation has been based on contract theory.

17. *See, e.g.*, Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. III, 1973).

18. *Compare* Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974), *with* Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973) (application of title VII to faculty status decisions); *compare* Browzin v. Catholic Univ. of America, 527 F.2d 843 (D.C. Cir. 1975), *with* Cusumano v. Ratchford, 507 F.2d 980 (8th Cir. 1974) (the role of professional norms in the interpretation of institutional obligations); *compare* Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973), *with* Rehor v. Case Western Reserve Univ., 72 Ohio Op. 2d 23, 331 N.E.2d 416, 43 Ohio St. 2d 224 (Sup. Ct. 1975) (whether a professor modifies his tenure by accepting an annual renewal). *See generally* Finkin, *Toward a Law of Academic Status*, 22 BUFFALO L. REV. 575 (1973).

19. *See Arbitration of Faculty Grievances*, 59 AAUP BULL. 168 (1973).

20. M. FINKIN, R. GOLDSTEIN & W. OSBORNE, A PRIMER ON COLLECTIVE BARGAINING FOR COLLEGE AND UNIVERSITY FACULTY 82 (1975).

Rutgers University merely creates a joint administration-faculty review committee whose report is advisory to the president.[21] This in essence reserves the resolution of disputes to the internal political processes of the institution, a satisfactory approach when the faculty has confidence in the integrity of those processes. At the other end of the spectrum a faculty may simply adopt the "industrial model." For example, the collective agreement for the faculty of Roger Williams College (R.I.) requires "just cause" for any faculty termination, both tenured and non-tenured, subject to arbitral review under that standard.[22] Agreements in other institutions permit review of the merits, but under a standard of whether the action was arbitrary or capricious.[23]

The leading approach to collective agreements contemplates arbitral review of whether faculty status decisions were arrived at in accord with procedures found either in the agreement itself or in institutional regulations, policies, and practices. Adoption of this approach creates a dichotomy between arbitrable procedural error and non-arbitrable substantive decisions. Indeed, a number of agreements make it quite explicit that the arbitrator is not to reach the "merits" of such decisions or to substitute his judgment for the "academic judgment" involved.[24]

The initial collective agreement in the City University of New York (CUNY) system are paradigmatic.[25] They provided, *inter alia*, for the maintenance of the rights of all faculty bodies established by university bylaws or by the agreement, and for the establishment of standing arbitration panels composed of persons, serving on a rotating basis, "familiar with the customs, practices, nature and spirit of the academic community." A grievance was defined as breach or misapplication of the agreement, or arbitrary application of or a failure to act pursuant to the bylaws and policies of the governing board relating to terms and conditions of employment. This definition was subject, however, to a *Nota Bene* providing that grievances relating to appointment, reappointment, promotion, or tenure "which are concerned with academic judgment" may not be arbitrated. An allegation of arbitrary or discriminatory use of procedure may be arbitrated subject to a limitation that:

---

21. Agreement between Rutgers, the State Univ., and the Rutgers Council, AAUP, art. VIII (May 15, 1973 as amended, July 18, 1974).

22. Agreement between Bd. of Trustees, Roger Williams College, and Roger Williams College Faculty Ass'n (RIEA/NEA), arts. IX, X (1973-74).

23. Agreement between the State Bd. of Regents and the Univ. of Rhode Island AAUP, art. XV (Nov. 6, 1972); Agreement between the Adm'n of Pratt Institute and the United Fed'n of College Teachers, Local 1460, AFT (AFL-CIO), art. XVI (Sept. 1972).

24. Benewitz, *A Proposal for Improving College Arbitration*, 29 ARB. J. 43, 44 (1974); Ferguson & Bergan, *supra* note 3, at 377-78; Finkin, *Grievance Procedures*, in FACULTY UNIONS AND COLLECTIVE BARGAINING 66 (E. Duryea & R. Fisk eds. 1973).

25. The initial agreements containing substantially the same language were negotiated for separate units of tenure-eligible and non-tenure-eligible professional staff represented by different unions. Agreement between the Bd. of Higher Educ. of the City of New York and the Legislative Conference, art. VI (Sept. 15, 1969); Agreement between the Bd. of Higher Educ. of the City of New York and the United Fed'n of College Teachers, Local 1460, AFL-CIO, art. VI (Oct. 3, 1969). Both the units and the union were later consolidated.

> In such case the power of the arbitrator shall be limited to remanding the matter for compliance with established procedures. It shall be the arbitrator's first responsibility to rule as to whether or not the grievance relates to procedure rather than academic judgment. In no event, however, shall the arbitrator substitute his judgment for the academic judgment. In the event that the grievant finally prevails, he shall be made whole.[26]

The intent of this and similar provisions in other agreements is clear: to insure adherence to internal faculty-administration processes while preventing the intrusion of an external, non-academic judgment into the substance of academic decisions. The intent is indistinguishable from the common faculty grievance procedure adopted outside collective bargaining. Accordingly, the discussion must turn to how well that end has been served in comparison with allowing review of the merits of challenged decisions.

III. THE ARBITRAL EXPERIENCE

A. *Arbitrability: The Proscription on Reaching the Merits of Academic Decisions*

When a faculty status decision is challenged upon a failure to adhere to procedural requirements, the issues presented are the seriousness of the procedural departure and the remedy to be afforded. Nevertheless, the presence of an "academic judgment" exemption or other prohibition on reaching the merits of a faculty status decision has not hindered the presentation of a grievance for arbitration touching on the merits, albeit in the guise of a procedural challenge. Grievants have argued that no *valid* academic judgment was made since the criteria employed or the considerations taken into account were not permissible. In addition, grievants have alleged that the judgment itself fell afoul of some other explicit contractual provision, such as a prohibition on discrimination due to union activity, which the arbitrator has jurisdiction to apply.

(1) *Defining an Exempted "Academic Judgment."*

When, as in CUNY, an "academic judgment" is exempted from arbitration, the arbitrator will be called on to decide what constitutes such a judgment. One arbitrator held, for example, that a college-wide faculty personnel committee may properly fail to concur with a favorable departmental renewal recommendation for reasons having nothing to do with the candidate's qualifications, but solely on the basis of a projected need to consolidate institutional offerings in several departments.[27] Equally, it was held an exercise of academic judgment for a department to allocate part-time

26. *Id.* The history of negotiations on the arbitration provision and a critique of early awards is supplied in Mintz & Golden, *In Defense of Academic Judgment: Settling Faculty Collective Bargaining Agreement Grievances Through Arbitration*, 22 BUFFALO L. REV. 523 (1973). *See also* J. Weisberger, *supra* note 4, at 13.

27. Board of Higher Educ. of the City of New York v. United Fed'n of College Teachers, Local 1460, AFL-CIO, AAA Case No. 1339-0360-72 (April 9, 1973) (Rubin, Arbitrator).

teaching funds to deserving graduate students rather than to part-time lecturers.[28]

While these conclusions are sound, it is important to note that the arbitrator had to consider the justification for these decisions in order to ascertain whether they were within the ambit of the faculty's and administration's discretion. The latter award makes clear that the arbitrator personally approved of the department's choice on the merits.[29] Thus, where the validity of the criteria employed in making an "academic judgment" is challenged, the exemption of a decision on the merits from the scope of arbitration does not entirely foreclose review of the factors involved in the decision; an arbitral determination that an invalid judgment was made may potentially be based upon an arbitrator's disagreement with the considerations the faculty and administration brought to bear.

A different approach is reflected in two awards which deal with academic judgment in terms of the respective roles of the campus president, the university chancellor, and the governing board in decisions on the award of tenure. In October 1970 the chancellor of CUNY issued a statement to the campus presidents that more selective procedures were required for the award of tenure. The chancellor asked that new faculty have a fifty percent chance of acquiring tenure and that no department have more than three-fourths of its full-time faculty tenured. After vigorous objection by the bargaining agent for the full-time faculty that tenure "quotas" were being imposed, the chancellor issued a clarifying statement to the effect that his previous urgings were only "broad guidelines." He stressed the significance of tenure decisions, the responsibility of the presidents for the well-being of their institutions, and urged prudence "in making decisions that would result in too large a proportion of the faculty having tenure status."

A professor at Queensborough Community College was notified in early November 1970 that the faculty personnel and budget committee had recommended him for tenure, subject to approval by the governing board. The committee, although aware of the chancellor's guidelines, had recommended a number for tenure beyond the percentage urged and the president concurred in their recommendations. After meeting with the governing board's CUNY committee (in effect its executive committee), the campus president was directed to reduce the number of professors recommended for tenure. Accordingly, he returned the matter to the college personnel committee which refused to revise its recommendations. The president then reviewed the files for each of the candidates himself and reversed the affirmative recommendation of the faculty committee in eleven cases. A test case was brought by the professor on behalf of all those adversely affected. The arbitrator posed the issue as whether the president's removal of some names from the recommended list was unreviewable "academic judgment":

28. Board of Higher Educ. of the City of New York v. Local 1460, UFCT, AAA Case No. 1339-0077-72 (Jan. 13, 1973) (Wildebush, Arbitrator).

29. "This Departmental decision was not arbitrary. It was in the best interests of the College, and also in the national interest." *Id.* at 10.

> 'Academic judgment' is a professional judgment employing such relevant criteria as the judgers see fit to employ, including but not limited to those which may be mandated by the collective bargaining Agreement and in the rules, policies and Bylaws of the Board. Subjective and intangible considerations must play a part in evaluations that comprise academic judgment. Assessments by secret-ballot votes of P&B's [Personnel and Budget Committees] and by Presidents embrace many factors based on materials in the files as well as personal knowledge.[30]

The arbitrator concluded that a second look at the tenure recommendation by the president on his own initiative would not constitute an arbitrary or discriminatory use of procedure. On the other hand, he found the actions of the chancellor and the CUNY committee improper since they had in fact compelled the president to revise his recommendation. He concluded that although the president used "academic judgment" in weeding eleven names from the original list, the decision to eliminate them was not an "academic judgment."

In a companion case arising in a sister community college the same arbitrator concluded that the president had voluntarily accepted the chancellor's guidelines in deciding initially not to accept the recommendation of his college's personnel and budget committee.

> Since Presidents are charged with responsibility for tenure recommendations under the Board's Bylaws, those standards and guidelines which the Presidents deem appropriate may be utilized in the exercise of their academic judgment. This is quite different from circumstances in which the academic judgment of a President might be improperly overridden by a higher authority, and his recommendations then would not be the result of the President's own judgment. Only if a President were compelled to change his judgment to meet conditions promulgated by others, to defer to the judgment of someone else against his own inclinations, could it be said that arbitrary or discriminatory procedures were involved.[31]

The arbitrator pointed out that the same guidelines urged by the chancellor may well be accepted and taken into account by the faculty, and the "voluntary adoption of such a concept to attain a certain level of tenured faculty could not be held violative of the Agreement." Moreover, if the president's decision is "the product of his review and reflection on the qualities of various candidates, in the light of the needs of the institution, the fact that some one else might have come to a totally different conclusion or even a 'better' one—is immaterial."[32] Thus, he observed that the personnel and budget committee's unanimous recommendation of the grievants does not limit the president's "academic judgment."

The arbitrator in these two cases adopts an operational definition of "academic judgment": an academic judgment is one made by an academic. The result, however, is made to turn on the state of mind of those exercising

30. Board of Higher Educ. of the City of New York v. Legislative Conference, AAA Case No. 1330-0090-71, at 18-19 (Jan. 25, 1972) (Friedman, Arbitrator).

31. Board of Higher Educ. of the City of New York v. Legislative Conference, AAA Case Nos. 1339-0167-71, 1339-0169-71, at 6 (Jan. 25, 1972) (Friedman, Arbitrator).

32. *Id.* at 11.

such judgment. When the president "voluntarily" accepts the guidelines he is exercising academic judgment; when he "feels coerced" a remedy is afforded.

These two awards concern a significant problem of academic government. If the governing board chooses to "up-grade" standards for the award of tenure, new standards binding on the college faculties and administrations may be promulgated, or an intense review of each individual recommended for the award of tenure may be initiated according to what the board conceives to be desirable standards. The former approach might require the board to deal either with the university faculty senate or the collective bargaining agent, or both, in the establishment of new policy. An intense review is unworkable, for the board lacks both the time and expertise necessary to review the hundreds of recommendations generated in so large a system. Negative actions would occasion considerable friction with local campus faculties and administrations, and the grievance procedure would become over-burdened. Thus, the CUNY board apparently chose a middle ground: on the one hand, the board moved toward revision of policy without officially adopting it; on the other, the board pressed to have the new policy accepted at the campus level. From this perspective the arbitrator's reliance on the campus president's "state of mind" is irrelevant to the larger issue of academic government actually posed in the two cases.

The fair import of this brief review is that an "academic judgment" is an independent judgment made by academics on the basis of academically cognizable criteria. The arbitral role is, by this definition, restricted to determining whether academics exercised an uncoerced discretion solely on the basis of considerations customarily employed in the institution or normally taken account of in the academic community. This seeming restriction, then, presents a palpable invitation to arbitrate.

(2) *Resolving Conflicts with Other Provisions.*

A proscription on reaching the merits may conflict with provisions prohibiting employment discrimination, guaranteeing academic freedom, or otherwise governing faculty status decisions found either in the collective agreement or in institutional policies and practices incorporated by reference.

(a) *Non-discrimination.* When a prospective appointee at Queens College of the City University alleged that the institution's refusal to appoint was for reasons violative of the non-discrimination clause of the contract, the arbitrator held that his authority was unaffected by the *Nota Bene* if the alleged action was not an exercise of academic judgment or a misuse of procedure, but a violation of some substantive mandate of the collective bargaining contract. Accordingly, despite a board policy against providing reasons for nonappointment, the arbitrator called for reasons and retained jurisdiction to determine the question of discrimination if the dispute was not resolved.[33]

33. United Fed'n of College Teachers, Local 1460, AFL-CIO v. City Univ. of New

The administration had urged that the "academic judgment" exclusion controlled. The arbitrator observed, however, that the facts, showing an affirmative recommendation for appointment by subordinate authority and an almost immediate negative reaction by the administration without the physical presence of the individual's dossier, demonstrated an abrupt, arbitrary exercise of authority, not an "academic" decision. He continued:

> To find otherwise would be to make any negative determination by one or another level of authority at the University a final and binding act completely invulnerable to review simply by reference to the status of the individual rendering it. A decision by the Dean of Faculty to recommend appointment or not to recommend appointment may well be an 'academic decision' in the vast majority of instances. The fact that it is a decision by the Dean of Faculty does not, however, *per se* make it such an 'academic' type determination.[34]

Thus, the award held that the limitation on the arbitrator's jurisdiction did not apply where the substantive breach of some contractual commitment has been alleged. This result is sound, for a contrary conclusion would have rendered the non-discrimination clause hortatory. What remains to be seen is whether this approach has been followed elsewhere in conflicts over other types of provisions.

(b) *Academic Freedom.* The collective bargaining agreement then governing the faculty of Southeastern Massachusetts University contained an article guaranteeing "Academic Freedom and Democracy" by providing, *inter alia*, that the exercise of "legal . . . rights shall in no way jeopardize the faculty member's position . . . ."[35] A faculty member of some years of service in the institution pursued a grievance concerning his transfer by the institution's president from the education department, of which he had been the acting chairman, to the department of English. The contract made no provision for faculty transfers but did contain an article on management rights, and the pre-existing policies of the board of trustees set forth the right to transfer. The arbitrator held that, "The Administration is not required to prove 'just cause' for transferring a professor. It is a management right and as a result action under it does not require a defense."[36]

York, AAA Case No. 1339-0206-70 (June 17, 1970) (Christensen, Arbitrator) [not currently on file].

34. *Id.* at 14. The result has been followed in CUNY and elsewhere. For example, the issue was also raised by the allegation that the refusal to appoint the grievant as a department chairman in one of the Chicago city colleges was due to his union activity and, therefore, violative of the non-discrimination clause. The collective agreement required that the dean of the campus consult with eligible members of a department prior to appointing a chairman and state his reasons for the appointment in writing. The grievant was proposed by his department in a 7-4 vote; the other candidate was the incumbent, whom the dean nevertheless reappointed to the chair. The arbitrator observed that under the contract only the advice, not the consent, of the department was required. The dean's authority was, he held, "virtually absolute" except as limited by the nondiscrimination provision pursuant to which the dean cannot refuse to appoint "if the sole and only reason . . . is disapproval based on union activities." Board of the Junior College, Dist. 508, Chicago, Illinois v. AFT Cook County Teachers Union, Local 1600, AAA Case No. 5130-0044-68, at 6, 7 (July 9, 1968) (Davis, Arbitrator).

35. SMU Faculty Fed'n Chapter 1895, AFT v. Board of Trustees, SMU, AAA Case No. 1139-0490-70, at 11 (March 10, 1971) (Kennedy, Arbitrator) [not currently on file].

36. *Id.*

Inasmuch as a violation of the substantive provision on academic freedom had been alleged, however, the arbitrator observed that the right to transfer did not free the administration to violate other sections of the contract in the process of effectuating the transfer. Thus, the arbitrator noted that transferring a teacher "for the purpose of denying him the freedom to discuss controversial . . . issues"[37] in the department from which he was being transferred would be a violation of the contract terms. Reasons for and the circumstances surrounding the transfer were given by the president of the institution and were held to be plausible. The arbitrator denied the grievance, noting that, "a charge of violation of academic freedom constitutes a very serious allegation against anyone in academic administration and . . . we believe it must be supported by a clear preponderance of evidence" not found in the instant case.[38]

About the time the above dispute was decided, however, another arbitrator was called on to decide the arbitrability of an alleged violation of academic freedom in a decision not to renew the appointment of a nontenured faculty member at the same institution. The collective agreement contained a dismissal procedure for tenured faculty requiring "just cause" and a right to a hearing before the board of trustees, and limiting any subsequent recourse to judicial review. The agreement also provided for a detailed evaluation of nontenured faculty by peers on both a departmental and institution-wide basis, but distinguished tenured from nontenured status by requiring the provision of reasons for dismissals of tenured faculty only.

The arbitrator reasoned that the procedures for dismissal of tenured faculty substituted judicial review for arbitration and served, in effect, to bar recourse to the grievance procedure.

> Although Article VIII [on tenure] does not specifically state that nontenured faculty members shall have no right of appeal, it does state that they need not be given the reasons for dismissal, and specifically reserves the 'just cause standard' only to the tenured faculty. For us to hold that the exclusion of tenured faculty members from right of appeal to the grievance procedure does not extend to nontenured faculty members in the light of the specific language and obvious intent of Article VIII, would be to grant such nontenured faculty members greater rights under the Agreement than tenured faculty members. We find no contractual or practical basis for so doing, particularly when considering the superior status attached in the academic world to possession of tenure.[39]

An opposite conclusion in the second case could have been drawn had the arbitrator opined that the sought-for review did not confer greater rights on nontenured faculty than on tenured colleagues but merely supplied a different forum. While the dismissal of a tenured faculty member could be effected only through a prior hearing on the basis of "just cause" before the board of trustees with a right of subsequent judicial review, an allegation by

37. *Id.* at 21.
38. *Id.* at 23.
39. Board of Trustees, Southeastern Mass. Univ. v. SMU Faculty Fed'n, Local 1895, AFT, AAA Case No. 1139-0528-70, at 8 (April 6, 1971) (Zack, Arbitrator) [not currently on file].

a nontenured faculty member of a violation of his academic freedom by a decision not to renew would be heard under the approach not adopted through the more informal machinery of the grievance procedure. Unlike the board hearing the administration would not be required to demonstrate "just cause" for its decision, nor would it have to state its reasons, at least initially. The burden would rest on the grievant to prove a violation of the academic freedom guarantee and, assuming sufficient evidence is produced to establish a prima facie case, the arbitrator could then require the administration to come forward with an explanation for its decision. This alternative approach is consistent with the "superior status" of tenure in the academic world on which the arbitrator relied without further elaboration to buttress his reasoning.

In the two Massachusetts decisions the arbitrators were called on, in effect, to weigh competing values reflected in ambiguous contractual provisions. In the first award the guarantee of academic freedom took precedence over "management rights." In the second the arbitrator construed the contract narrowly, based on the disclaimer for the provision of reasons, the effect of which, however, was to render the agreement's guarantee of academic freedom essentially hortatory in nonrenewal cases.

(c) *Substantive Criteria for Faculty Status Decisions.* The criteria for faculty status decisions may be provided directly in the collective agreement or may be found in general institutional policy and practice incorporated by reference or by a "past practice" clause. In addition, an "academic judgment" exemption is often coupled with a provision safeguarding the operational role of collegial bodies. However, unlike the determination of what constitutes an academic judgment or whether impermissible considerations played a significant role in the negative decision, consideration of the application of institutional critieria inject the arbitrator more directly into the decision-making process. The following is illustrative.

A group of part-time lecturers in two science departments of Brooklyn College of CUNY were notified of nonreappointment due solely to a change in the personnel policies of their departments which had decided to seek active doctoral candiates or individuals already possessing the doctorate for these positions. A contract provision headed "Notice of Appointment and Reappointment" applicable to part-time faculty set out as one category of faculty subject to nonreappointment, those whose nonrenewals are occasioned by insufficient registration, financial inability, or changes in curriculum. The contract also established a departmental preferential rehiring list for those individuals whose appointments are terminated on any of these grounds.

The arbitrator held that the exclusive permissible bases for the termination of part-time faculty were the three set out in the above provision, in addition to poor evaluation and misconduct.[40] He reasoned that "[i]f the University

40. City Univ. of New York v. Local No. 1460, UFCT, AFL-CIO, AAA Case No. 1330-0207-70, at 5 (May 25, 1970) (Wildebush, Arbitrator) [not currently on file]. Although the basis of poor evaluation was dealt with in another provision of the contract, no provision concerning termination for misconduct was present. However, mis-

had the right not to reappoint part-time employees because of a change in personnel policies, such employees would have no preferential rehiring rights under the contract."[41] This, he opined, would constitute a form of discrimination against them not intended by the parties. In ordering the reappointment of the complainants, he acknowledged but discounted the University's argument that it should be permissible to replace a nontenured faculty member with one more highly qualified:

> The philosophy of hiring the best personnel available is of course commendable, and it is presumed whenever anyone is hired, at the time of such hiring, he is the best available. The upgrading of a faculty is also desirable but may not be done at the expense of violating a contract. The term 'upgrading' is, of course, a subjective term. The mere holding of a doctorate, or taking courses toward a doctorate, does not of itself mean that such an individual would make a good lecturer or professor, nor that a faculty would necessarily be upgraded by having such an individual become a member of the faculty.[42]

A month after the above award another case was decided by a different arbitrator concerning the nonrenewal of appointment of a full-time lecturer in Hunter College of CUNY.[43] The department's personnel committee had notified the faculty member that its decision was based on the changing character of course requirements, the attendant uncertainty of assignable classes, and the failure of the faculty member to pursue a doctorate. To the union's allegation that assignable classes were available the arbitrator responded that the determinations of what classes are to be given which individuals is encompassed in the "academic judgment" exclusion.

The question posed with respect to progress toward the doctorate was, the arbitrator observed, "more difficult." The contract provided that full-time lecturers acquire a form of administrative tenure and limited the use of the title to "faculty who are hired to teach and perform related faculty functions but do not have a research commitment." On the other hand, part-time lectureships are limited to "people who are working toward a doctorate on a full-time basis and are to be employed as part-time teaching or research personnel." The arbitrator found the language of the job title provision as fully contemplating a continued interest and effort by its holders in obtaining a doctorate: "While my personal evaluation of the necessity for receipt of (or study for) the Ph.D. degree might well vary from that adopted by the Grievant's department, it is impossible for me to find and conclude other than that this is, in rather pristine form, a matter of 'academic judgment.' "[44] The arbitrator took note of the prior award, but observed that it was based on provisions solely applicable to part-time lecturers. In concluding that this refusal of reappointment is not subject to arbitral reversal, he underlined that

---

conduct is "commonly recognized by courts and arbitrators as a reason for dismissal or nonreappointment, because it involves a lack of fitness to teach, a failure to meet standards of conduct, express or implied." *Id.*

41. *Id.*

42. *Id.* at 4.

43. United Fed'n of College Teachers, Local 1460, AFT, AFL-CIO v. City Univ. of New York, AAA Case No. 1339-0284-70 (June 23, 1970) (Christensen, Arbitrator) [not currently on file].

44. *Id.* at 12.

unlimited or unreviewable authority with respect to appointments cannot be exercised by the administration.

> [W]here such a denial of appointment or reappointment clashes with a provision of the Agreement it cannot be termed protected as an exercise of 'academic judgment;' that judgment has, in such instances, been made subordinate to a contractual limitation fully within the arbitrator's power to interpret and apply. Finally, failure to supply any reason for a refusal to appoint or reappoint, while possibly an option legally available to the Board prior to the execution of this Agreement, is now subject to application of the terms of that contract.[45]

Eleven months later an award concerning the nonrenewal of a full-time lecturer in Queens College was handed down by the arbitrator who decided the part-time lecturers' case.[46] The faculty member had been recommended for nonrenewal by the departmental personnel committee entirely on the basis that he lacked a doctorate. The arbitrator held the matter to be arbitrable under the contractural provision defining the position of full-time lecturer. He reasoned that inasmuch as such an appointee has, by definition, no research commitment and as the Ph.D. is a research degree, the reliance on its absence as the sole basis for nonrenewal was impermissible under that section of the agreement. While he distinguished the prior case both on the difference between arguments advanced by the union in each case and on the variance in the facts, he nevertheless departed squarely from the substance of the prior decision:

> The reading into Article 13.1 [defining a full-time lecturer] a requirement for a Ph.D. as a matter of 'academic judgment' appears to the undersigned as a very substantial deviation from the language of the contract, and imposes a condition which was not negotiated by the parties.
>
> This arbitrator recognizes that scholarly research could be helpful to teaching effectiveness. He also recognizes that many academicians equate the possession of a Ph.D. with scholarly research. However, the contract bars the University from using the criteria of scholarly research and the lack of a Ph.D. as the *sole* grounds for denying reappointment . . . .[47]

Thus, the arbitrator treated the department's action as reading into the contract's job definition the impermissible requirement of a doctorate. However, the job definition neither mandated nor prohibited, on its face, a doctoral requirement, and the policy of Queens College prior to the contract required a Ph.D.[48] Further, the faculty of the City University enjoyed a good deal of professional autonomy and the contract contained explicit language reflecting an intent not to diminish the rights of the faculty unless in explicit conflict with the terms of the agreement. From this perspective the academic department did not abuse a prerogative by reading into the *contract*

45. *Id.* at 13.
46. City Univ. of New York v. United Fed'n of College Teachers, AFT, Local 1460, AFL-CIO, AAA Case No. 1330-0286-70 (May 26, 1971) (Wildebush, Arbitrator).
47. *Id.* at 15.
48. *Id.* at 14.

"a condition not negotiated by the parties," but exercised a pre-existing right of a professional character, recognized in the institution's policies, to set its standards for membership.

It is curious that in the part-time lecturers' case the arbitrator had no difficulty in reading misconduct into the contract as a valid basis for termination (raising the interesting question of how that misconduct would be determined in the absence of contractual provisions dealing with it) but encountered difficulty in allowing the faculty of an academic department to set the qualifications requisite for reappointment in spite of the *Nota Bene.* The reasoning of the arbitrator is strained since preferential rehiring is established apparently for those otherwise qualified to teach but whose classes are cancelled due to reduced enrollment, financial inability, or curricular change. The departmental judgment involved addresses the threshold question of the individual's teaching qualifications. On balance the arbitrator has in both the part-time and full-time cases reviewed the *reasonableness* of the department's standards for the qualification of its members which, he admits, were not patently without foundation.

An ostensibly more procedural approach was taken in a nonrenewal case in CUNY where the grievant challenged the faculty action not to renew under a provision of the collective agreement requiring that no lecturer "shall be denied reappointment on the basis of incompetence" unless two of the three preceding evaluations indicated unsatisfactory performance. The arbitrator held that whether or not that requirement was met was arbitrable, notwithstanding the *Nota Bene.*[49] He reviewed the faculty evaluations of the grievant, and concluded that they constituted an unfavorable judgment. While avoiding the question of the tenability of that conclusion, the arbitrator expressed concern that the language of the evaluations did not expressly state that the grievant's work was unsatisfactory, although the grievant understood them to constitute an unfavorable judgment. Accordingly, he laid down a rule for future treatment:

> I cannot conclude without adding the observation that while the newness of the parties' contractual relationship and the procedures contained therein might excuse some looseness in the actual conduct of these procedures, the fact that evaluation summaries are of such direct importance to continued employment and the experience of this case would lead me in the future to disregard [where a similar allegation under this section of the agreement is presented] any such summary that did not directly if not in haec verba warn the individual of the fact of unsatisfactory professional performance.[50]

At first blush this statement is no more than sound interstitial legislation. Procedural rigor by the faculty was substituted for the arbitral consideration of whether the grievant was in fact found to be incompetent based on an independent scrutiny of the evaluation reports. As a practical matter, however, the award might place considerable pressure on the department to

49. United Fed'n of College Teachers, Local 1460 v. Board of Higher Educ. of the City of New York, AAA Case No. 1339-0279-71 (Jan. 12, 1972) (Christensen, Arbitrator).

50. *Id.* at 16.

rate as many faculty members as possible "unsatisfactory" simply to retain flexibility at the time a final recommendation must be made, since a nonrenewal recommendation in the absence of such an explicitly negative evaluation would raise a question of an arbitrary use of the evaluation procedure. On the other hand, a discernible pattern of negative evaluations made simply to retain flexibility also could be considered an arbitrary use of procedure. Thus, under either result the arbitrator would be called on to treat the underlying merits in order to determine whether the contractual requirement was applied properly. Fortunately, at least from the perspective of academic processes, a later award obviated the need to resort to this measure by rejecting the union's argument that a lecturer was entitled to reappointment unless rated unsatisfactory in two of the last three evaluations, thus allowing the peer group to select from among a group of admittedly well qualified candidates.[51]

In grievances based on the misapplication or non-application of the criteria established for the decision, the arbitrator has, in effect, been called on to balance the individual interest of the faculty member, the collegial interests of the faculty, and the collective interests of the faculty bargaining agent in the context of perhaps ambiguous or conflicting regulatory provisions. A decision to hold the matter arbitrable reflects a judgment not only of the manner in which the balance should be struck, but also of the arbitrator's competence ultimately to decide the merits. As the dispute over the Ph.D. requirement illustrates, once the gate is opened to review of the criteria applied an arbitrator could conceivably achieve a result at variance with recognized institutional practice. On the other hand, a declination to hold the matter arbitrable at all may loosen discretion beyond the bounds contemplated by the institution's personnel policies.

These awards dealt with decisions recommended initially by the faculty and confirmed by the administration. The issues are expanded when the administration fails to concur in a faculty recommendation, in that the interest in maintaining the system of peer participation is added to the balance the arbitrator must strike. The issue was posed rather crisply in the context of relatively unambiguous contract language governing the New York Institute of Technology—a private four-year institution.[52] The agreement provided for faculty recommendations on personnel decisions followed by administrative review and presentation to the governing board for final action. In addition, the agreement explicitly provided that "[p]rocedures shall follow AAUP [American Association of University Professors] guidelines for the

51. Board of Higher Educ., City of New York v. Professional Staff Congress/CUNY, AAA Case No. 1339-1156-73 (June 11, 1974) (Kahn, Arbitrator). The Union later sought unsuccessfully to secure a similar provision in the collective agreement. *See* Finkin, *Faculty Collective Bargaining in Higher Education: An Independent Perspective*, 3 J. LAW & EDUC. 439 (1974).

52. New York Institute of Technology v. Council of Metropolitan & Old Westbury Chapters AAUP, AAA Case No. 1330-0635-75 (March 18, 1976) (Knowlton, Arbitrator). Upon compulsion by a state court the case proceeded to arbitration. New York Institute of Technology v. AAUP, 47 App. Div. 2d 659, 364 N.Y.S.2d 190 (1975). *See also* text accompanying notes 75-77 *infra* concerning the interpretation of the *Statement on Government* under a different contract.

governance of the college," and the grievance procedure itself provided that if the faculty's collective bargaining agent "decides that the remedy is not in accord with the AAUP Guidelines for Governance of Colleges [*sic*] (which the college has agreed to)," then the case may be taken to arbitration. It was agreed that the "guidelines" referred to was the *Statement on Government of Colleges and Universities* drafted jointly by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges; that is, the three leading national organizations of faculty, institutions, and trustees. The *Statement* provides that faculty status decisions are the "primary responsibility" of the faculty with which the president and governing board should concur "except in rare instances and for compelling reasons which should be stated in detail."

When the affirmative recommendations of the faculty in two tenure cases were rejected by the Institute's governing board the faculty sought to arbitrate whether the *Statement on Government* had been adhered to. The administration argued that the dispute was not arbitrable inasmuch as it had never explicitly agreed to be bound by the *Statement on Government*. After reviewing conflicting evidence on bargaining history, the arbitrator held that the *Statement on Government*, which he seems to have viewed as admonitory rather than directive, had not been expressly incorporated into the contract, unlike the incorporation of other AAUP *Statements* and the adoption of express personnel procedures requiring faculty participation. The unarticulated assumption of an analytically slender award seems to be that any derogation from "management's" control of personnel decisions must be more clearly provided.[53]

53. Note, however, the rather different analysis supplied by Arbitrator Myron Joseph in deciding whether the collective agreement's provisions governing the faculty's role in the selection of department heads necessarily proscribed the administration's abolition of that position for a particular department:

> [T]he Department Head, nominated by the department members, plays an important participative role in many of the College's decision processes. Through and with the Department Head the faculty shares in this participation. If, as the College argues, it has the right to determine whether or not a Department can have a Department Head, the College would have the power to deprive selective groups of faculty members of major rights that were written into the Agreement as a result of Collective Bargaining. Such an unusual and improbable interpretation would require clear and compelling language that spelled out the parties' intent.

Community College of Allegheny County v. American Fed'n of Teachers, Local 2067, AAA Case No. 55-39-0008-73, at 7-8 (May 18, 1973) (Joseph, Arbitrator).

The arbitral confrontation with analogous issues has not been entirely consistent. *See* Senate Professional Ass'n v. New York (State University of New York at Binghamton), OER File No. PS-SU-BI-1 (Jan. 22, 1973) (Yagoda, Arbitrator) (the chancellor of the university had authority to delete a non-tenured faculty "line" in a department thereby precluding renewal of the incumbent even though the procedures for evaluation and renewal would be circumvented); Lansing Community College Chapter, MAHE v. Board of Trustees of Lansing Community College, AAA Case No. 5439-228-71 (June 9, 1971) (Heilbrun, Arbitrator) (the board had the power to adopt policy for student evaluation of faculty but lacked the power to use the results in promotion decisions pending agreement with the faculty on such use); Bucks County Community College v. Bucks County Community College Fed'n of Teachers, Local No. 2238, AFT, AFL-CIO, AAA Case No. 1430-0239-74S (undated) (unsigned) (the failure to include retirement as a valid ground for discontinuance of a tenured professor in the collective agreement precluded the adoption of a mandatory retirement policy and its application to a senior faculty member); Bryant College Faculty Fed'n, Local 1769, AFT, AFL-CIO v. Bryant College of Business Administration, AAA Case No. 1130-0313-75 (Oct. 17, 1975)

A similar reluctance to reach the merits was reflected in ambiguous language in the collective agreement governing Onondaga Community College.[54] The agreement provided that decisions on reappointment be made by the board of trustees following the recommendation of the academic department, the faculty committee on reappointments, promotion, and tenure, and the institution's president. A hearing procedure was provided for dismissal of tenured faculty, the sole grounds for which were either the failure to maintain teaching standards or moral turpitude. An appendix to the agreement provided a hearing procedure for currently employed nontenured faculty who alleged that considerations violative of academic freedom played a significant role in nonrenewal decisions and allowed resort to arbitration in the event the complainant was dissatisfied with the resulting review. The provision on nonreappointment recited that "[t]he reasons for nonrenewal of a term contract are the same as those for termination of tenured faculty members except that no reasons need be given to the individual concerned."

Two faculty members were recommended favorably for renewal by the faculty reappointments, promotion, and tenure (RPT) committee, a decision in which the administration did not concur. The arbitrator held the grievance to be nonarbitrable; the contract showed that the discretion not to renew was lodged in the administration without provision for review even though the grounds to which the administration was supposed to address itself were specified. He cited the "well-established background of practice" in the academic world as requiring unequivocal language in the contract to establish review of the reasons for nonrenewal. In an effort to offer assurance that academic freedom was not infringed in nonreappointment decisions, he observed that academic freedom allegations were expressly reserved in the contract to an internal hearing procedure and were not raised in the case.

In the event the administration disagreed with the recommendation of the RPT committee the contract provided that the matter "shall be returned to the Committee with reasons in writing."[55] The arbitrator observed that the procedure was intended to "bring before the administration the faculty opinion with respect to the teaching and scholarly abilities"[56] of the candi-

(Teele, Arbitrator) (tenure criteria permitted the institution to require a Ph.D. of a candidate recommended by his department even though past application of the criteria had never so required).

54. Onondaga Community College v. Onondaga Community College Fed'n of Teachers, Local 1845, AFT, AFL-CIO (May 22, 1969) (Hyman, Arbitrator) [not currently on file]. Two-year institutions often lack a well developed system of faculty government and thus may be more akin to the public schools than to colleges or universities. Finkin, *Collective Bargaining and University Government*, 1971 WIS. L. REV. 125, 127. Nevertheless, available awards which reflect problems similar to those encountered at the four-year level will be discussed. Indeed, it has been suggested that such institutions are most likely to use collective bargaining to advance a heretofore nascent faculty government. F. KEMERER & J. BALDRIDGE, *supra* note 12, at 7.

55. Onondaga Community College v. Onondaga Community College Fed'n of Teachers, Local 1845, AFT, AFL-CIO, at 13 (May 22, 1969) (Hyman, Arbitrator) [not currently on file]. The recitation of the facts in the award is silent on the question of whether such reasons were supplied by the administration to the committee. No reasons of any kind appear in the text.

56. *Id.* at 18.

date and did not subject the grounds for nonrenewal "to review by any committee established under the collective agreement,"[57] or by the arbitrator.

An alternative reading of the contract was available inasmuch as reasons for non-concurrence were required to be supplied to the RPT committee, but the instant award failed to indicate whether those reasons were provided. Indeed a contrary result was achieved under a successor agreement which, from the award, does not seem to have varied the relevant terms substantially.[58] In this later case the Onondaga trustees accepted only fourteen of thirty-five candidates recommended to it for promotion by the RPT committee. That decision was reversed and a remedy fashioned after the arbitrator failed to "detect a rational basis to support the trustees' selections for promotion."[59] The first Onondaga and NYIT awards render the governance provisions largely ritualistic. The second Onondaga decision requires not only cooperation but rationality; thus, the arbitrator is enmeshed in the merits of promotion decisions at least when the administration and faculty disagree.

An intermediate course, charted by Arbitrator Russell Smith, fosters cooperation without confronting the question of later review of the grounds for disagreement.[60] This case concerned four nontenured professors at Oakland University (Michigan) who had been recommended for tenure by their respective departments and by the college-wide tenure committee. The dean of the school failed to concur in one of the four recommendations, all of which were transmitted to a university tenure and appointment policy (UTAP) committee consisting of a majority of the faculty and some members of the administration. The UTAP committee recommended the award of tenure in the three cases and concurred with the dean's recommendation to deny tenure in the fourth. The provost, with whom the president concurred, recommended the denial of tenure for all four professors. The trustees were presented essentially with the bare recommendations and sustained the president.

The collective agreement contained a management rights article as well as provisions guaranteeing continued adherence to faculty policies, practices, and procedures. The agreement also adopted the procedure-substance distinction for the purposes of arbitration. Nevertheless, Arbitrator Smith, holding for the three grievants recommended for tenure and against the fourth, stated:

> I determine . . . that the method used in communicating or transmitting the substance of the faculty action to the Board was deficient. But this deficiency in my opinion cannot be dismissed as of no significance. It is quite conceivable that had the communication included the elements stated above the members of the Board would have been

57. *Id.* at 17.
58. Onondaga Community College Fed'n of Teachers, Local 1845 v. Onondaga Community College, AAA Case No. 15-37-0151-73 (Sept. 14, 1973) (Dennis, Arbitrator).
59. *Id.* at 8.
60. Oakland Univ. Chapter, AAUP v. Oakland Univ. (May 17, 1974) (Smith, Arbitrator).

> substantially more alerted and attuned to the seriousness of a disagreement between top administration and faculty than they were, with the consequence that at least some of them would have given much more consideration to the basis and merits of the disagreement than they did. It is even quite conceivable that the results would have been different.[61]

The award eschews the readily available mechanical solution adopted in the NYIT and first Onondaga award. Arbitrator Smith clearly recognized that the elaborate system of committee review was intended to implement administration-faculty cooperation on personnel decisions. If mere formalism is to be avoided, the conduct of such a government necessarily implies comity and candor between administration and faculty which it is the arbitrator's role to foster. On the other hand, Arbitrator Smith was not prepared, as was the arbitrator in the second Onondaga case, to assume jurisdiction unequivocally to decide the rationality of whatever reasons might eventually emerge from the trustees for their failure to agree with the faculty's recommendation. Thus, whether the procedural distinction will either degenerate into formalism or expand to encompass review of the merits remains to be seen.

(3) *An Assessment.*

The practical implications of the procedure-substance dichotomy are well-stated by Arbitrator Clyde Summers:

> What is at once apparent is that primary reliance is placed on procedures to give assurance as to appropriate substantive results. The only guarantee a faculty member has of fairness is in the procedures, for the result is beyond review, and the procedure is carefully designed to that end. When such complete reliance is placed on procedure and there is no review of the result, then the procedure must be carefully followed to give the full protection intended. Those charged with carrying out the procedures can not wander or take short cuts; they must keep within the lines and turn square corners. This does not mean that inconsequential deviations will necessarily void the procedures, but it does mean that any substantial failure to follow the prescribed procedure in letter or in spirit will be presumed to infect the result. The burden is on the one seeking to excuse the procedural defect to show that it in no way affected the outcome.[62]

Several consequences are at once apparent. Since the only guarantee of fairness is procedural rigor, the faculty union labors under considerable political pressure to elaborate in ever expanding detail the procedural requirements in the collective agreement. To the extent this effort is successful the likelihood of procedural error is increased. The union is also under considerable pressure to pursue grievances on every procedural departure no matter how minor.[63] The result may be an extreme acceleration of

61. *Id.* at 35.

62. Wagner College Chapter, AAUP v. Wagner College, AAA Case No. 1330-0736-75, at 8 (Oct. 7, 1975) (Summers, Arbitrator).

63. In CUNY some arbitrators have been at pains to distinguish *de minimis* procedural error from that which is fatal to the decision. *See, e.g.*, Board of Higher

the "contract focus" of faculty status decisions which, over time, can only have a deleterious effect on academic life.[64]

To be sure, some of the awards discussed arise in the context of ambiguous contract language, and, as Professor Weisberger has suggested, the "failure to define academic judgment, or other similar words of art, coupled with the use of *ad hoc* arbitrators, invites a wide range of results."[65] Greater precision, however, might only clarify rather than resolve the dilemma, for it seems beyond doubt that, unless explicitly exempted from arbitration in the contract, the procedure-substance or "academic judgment" distinctions, no matter how carefully worded, cannot avoid confronting challenges either that the substantive criteria were misapplied, that the wrong criteria were applied, or that the decision was based on proscribed considerations.[66] To be fully effective, however, the contract would have to exempt all three categories, for the failure to exempt any one would encourage litigation precisely at the margin. The practical result then would be the elimination of any basis for challenge other than procedural fidelity which could itself be erosive of academic values in the longer run.[67] Accordingly, inquiry should be directed to defining the terms and structure of an arbitration system which candidly confronts the merits of faculty status decisions.

B. *Review of the Merits of Faculty Status Decisions*

Standards of "reasonableness," "just cause," or "arbitrariness" call for largely subjective arbitral judgments. Thus, fear is expressed that the arbitrator will intrude unduly and perhaps beyond his personal competence into the merits of academic judgments by making essentially de novo decisions.[68] The critical question lies in the assumptions the arbitrator brings to the disposition of the case and the sources he looks to for guidance to inform the standard.

Educ. of the City of New York v. Legislative Conference, AAA Case No. 1339-0397-71 (Jan. 12, 1972) (Friedman, Arbitrator); City University of New York v. Legislative Conference (Dec. 14, 1971) (Scheiber, Arbitrator).

64. As a recent study concluded, "Although procedural regulations will help the administration to rationalize its decisions and protect the faculty from arbitrariness, the proliferation of organizational rules could create a situation best termed 'the paralysis of the nitty gritty.' " F. KEMERER & J. BALDRIDGE, *supra* note 12, at 193.

65. J. Weisberger, *supra* note 4, at 21.

66. Thus, the debate concerning the degree of arbitral fidelity to the letter or spirit of the academic judgment exemption obscures the fact that the distinction invites grievances which perforce enmesh the arbitrator in the merits of the decision. *Compare* Mintz & Golden, *supra* note 26, *with* Benewitz, *In Defense of Academic Judgment: A Comment*, 23 BUFFALO L. REV. 201 (1973).

67. Indeed, Professor Weisberger later suggests that "the procedural substantive distinction may not be an adequate device to remove academic issues from grievance arbitration" no matter how well thought out. J. Weisberger, *supra* note 4, at 39.

68. *See, e.g.*, Oakland Community College v. Oakland Community College Faculty Ass'n, 58 Lab. Arb. 316 (1972) (McCormick, Arbitrator) (a de novo judgment of a faculty member's ability under a standard of "just and reasonable cause"). *See also* New Jersey Institute of Technology (Newark College of Eng'r) v. Newark College of Eng'r Professional Staff Ass'n, New Jersey Pub. Employment Relations Comm'n Docket No. AR-279 (Aug. 4, 1975) (Berkowitz, Arbitrator) ("just cause" means specific conduct amounting to cause for termination and not merely poor performance in lower level course instruction).

(1) *Faculty Selection, Retention, and Promotion.*

The collective agreement governing the faculty of the University of Rhode Island permits arbitral review of the merits of all faculty status decisions under a somewhat convoluted arbitral standard.[69] The burden of proof is assigned to the grievant except in dismissal cases. Therefore, in a contested promotion case the arbitrator construed the scope of an arbitration clause as permitting arbitral review of procedural error and of whether a prescribed factor was ignored or whether an impermissible one was permitted to play a material role.[70] But, he concluded, the evaluation provisions

> could be rendered ineffectual as well, were the arbitrator to be wholly foreclosed from review of the objective underpinning for the conclusions reached in the process. At this point the review of adherence to process takes on an undeniably substantive aspect. There is risk that once one opens this door, the incautious arbitrator will attempt to substitute his primary judgment for that of the administrative decision-makers. But the alternative is to ignore that the baseless, albeit honest, subjective judgment is in essence a failure to follow a procedure which aims to channel judgment within objective guidelines. Limited arbitral review of the decisional base is called for in assuring full and fair adherence to the contractual process regarding promotion. The limit inheres in this: the administrative judgment should not be set aside except where there is no substantial objective basis for that judgment.[71]

The arbitrator established a test of arbitrariness, and coupled the test with a procedural component geared to institutional governance, stating:

> [W]here the Department Chairman and the Dean concur in the recommendation, I think the prima facie case is made by (1) showing that concurrence; (2) demonstrating that the recommendation was grounded in the contractually relevant factors; (3) showing that the recommendation was warranted—i.e., that the application of the factors justified the conclusion. . . . Once that is done, it seems to me that the University whose higher administrative level has 'disagreed,' is obliged to explain the basis for that disagreement. Presumably, that explanation will narrow the scope of examination, so that we may determine whether the claimed deficiency has any substantive objective support.[72]

---

69. The agreement between the State Board of Regents and the University of Rhode Island AAUP provides in relevant part:

> 15.4.1 In any case of non-renewal, the burden of proof of the denial of due process, legal rights, academic freedom, arbitrary or capricious action shall be on the grievant, which proof shall be by a preponderance of evidence.
>
> 15.4.2 In any case of dismissal under tenure, the burden of proof shall be on the University, which proof shall be by clear and convincing evidence.
>
> 15.4.3 In cases dealing with non-renewal, promotion and award of tenure, the burden of proof shall be on the grievant, which proof shall be by a preponderance of evidence. The factors to be considered will be those enumerated in the Article titled Annual Review, Section 18.5, insofar as they apply.

American Ass'n of Univ. Professors v. Rhode Island Bd. of Regents, AAA Case No. 1139-0798-73, at 10 (Aug. 16, 1974) (MacLeod, Arbitrator).

70. American Ass'n of Univ. Professors v. Rhode Island Bd. of Regents, AAA Case No. 1139-0798-73 (Aug. 16, 1974) (MacLeod, Arbitrator).

71. *Id.* at 12-13.

72. *Id.* at 13.

Accordingly, he found the affirmative recommendation amply supported and the administration's reason for rejection entirely wanting in objective support.

In a promotion case decided at the University of Rhode Island shortly after the above award another arbitrator agreed that the issue was whether the president had a "reasonable basis" for denying a recommended promotion.[73] The arbitrator noted that the departmental vote was sharply divided, was opposed by the dean on the merits, and that there had been inadequate time to conduct the contractually-mandated evaluation. He held that the president's stated reason for declining to concur in the recommendation, a lack of sufficient substantial evidence to warrant promotion, had a "reasonable basis" and was neither arbitrary nor capricious. Implicit in the award is recognition that a heavier burden to justify a negative decision is assumed by the administration when it rejects a strongly affirmative (and procedurally sound) peer recommendation. Similarly, in another tenure case decided shortly thereafter at the University of Rhode Island Arbitrator Stutz made clear that heavy reliance was placed on the overwhelmingly negative vote of the grievant's department.[74] The awards at the University of Rhode Island should be compared with the result under the contractual language governing the faculty of the University of Bridgeport. That language was designed to integrate more clearly arbitration as an extension of institutional governance. Unlike the NYIT award discussed earlier, the Bridgeport agreement explicitly incorporated the *Statement on Government of Colleges and Universities.* Under the *Statement* faculty participation is required in program planning and resource allocation. Moreover, faculty are to have "primary responsibility" for curricular and faculty status decisions, subject to administrative reversal under the contract "in rare instances and exceptional circumstances, for compelling reasons written in detail which shall not be arbitrary nor capricious." The failure to act in accordance with the *Statement* is also made explicitly arbitrable.

The administration had decided on the basis of a current and projected decline in enrollment to limit the number of full-time faculty positions to those then holding tenure in the University's College of Education. Accordingly, the president rejected two recommendations for renewal of appointment made by the faculty and dean of the college. The arbitrator held that the instance was rare and the reason, a documented decline in enrollment, was neither arbitrary nor capricious.[75] He held, therefore, that the action of

73. University of Rhode Island, AAUP v. Rhode Island Bd. of Regents, AAA Case No. 1139-0070-74 (Sept. 4, 1974) (Stutz, Arbitrator). Both this and the preceding award were noted in Bucks County Community College Fed'n of Teachers, Local 2238, AFT, AFL-CIO v. Bucks County Community College, AAA Case No. 1430-0998-74 S (June 30, 1975) (Mogerman, Arbitrator), which held that the administration could decline to promote a faculty member recommended by his department when subsequent to the recommendation a substantial number of student complaints were filed and found to be accurate after thorough administrative investigation. However, a better reading of the University of Rhode Island cases would require the administration to return the matter for the department's reconsideration based on the new material of which it had not been aware at the time it acted.

74. University of Rhode Island, AAUP v. Rhode Island Bd. of Regents, AAA Case No. 1139-0161-73 (Oct. 8, 1974) (Stutz, Arbitrator).

75. University of Bridgeport v. AAUP, AAA Case No. 1239-0069-75 (Aug. 18, 1975) (Zack, Arbitrator).

the administration was consistent with the *Statement on Government* and denied the grievance.

The arbitrator proceeded on an assumption based on the bargaining history preceding the contract that the faculty had secured an "erosion" of the administration's "prerogative" in the area of faculty appointments which fell short of "total authority" in view of the veto power reserved to the president.[76] Accordingly, the issue was perceived as turning on the application of the "rare instances and for compelling reasons" test. On that issue, however, the award supplied scant analysis of how the decline in enrollment had actually affected the individual departments within the College of Education. The arbitrator suggested that any decline in enrollment constituted *per se* grounds for administrative reversal of collegial judgments, *i.e.*, that the *Statement on Government* had not "eroded" administrative "prerogative" to the extent of close arbitral scrutiny of its reasons.[77] The result ignored the clear language of the *Statement* and, more particularly, the commitment to maintain an institutional governance system.

In sum, the arbitrators in the University of Rhode Island cases attempted to avoid de novo arbitral judgments of the merits by requiring procedural rigor and objective information, and by placing an added burden on the administration when it declines to concur in peer judgments.[78] The latter

76. *Id.* at 11. Arbitrator Zack's approach seems quite similar to the approach taken by Arbitrator Knowlton in the NYIT case discussed in the text accompanying note 52 *supra.*

77. A similar paucity of analysis is found in Genessee Community College Educ. Ass'n v. Board of Trustees of Genessee Community College (Dec. 20, 1971) (Roumell, Arbitrator), concerning the administration's failure to concur in an academic department's recommendation of an appointee. The arbitrator held that the administration was not obliged to accept the recommendation, but could not reject it for arbitrary reasons. The candidate was employed in a Canadian university where he had a light teaching schedule and was apparently engaged in a good deal of research. His desire to move was motivated by the wishes of his family. The administration concluded that such motivation "would not be conducive to a person being asked to teach in a large community college with a heavy class schedule." *Id.* at 10. The arbitrator found the reason not to be arbitrary, although this was the first instance of a rejection of such a faculty recommendation. As in the Bridgeport case, the arbitrator chose neither to examine the factual underpinning for the rejection nor to give weight to the faculty recommendation.

78. *But see* Bryant College Faculty Fed'n, Local 1769, AFT, AFL-CIO v. Bryant College of Business Adm'n, AAA Case No. 1130-0313-75 (Oct. 17, 1975) (Teele, Arbitrator) (the lack of a Ph.D. was a valid ground for refusing to accept an affirmative faculty tenure recommendation). The award is unclear. On the one hand the award can be interpreted as sustaining an across-the-board effort to "upgrade" the faculty. If this interpretation is correct, the award suffers from the infirmity suggested in conjunction with the text accompanying notes 30-32 *supra.* On the other hand the college's rules incorporated in the collective agreement explicitly required "[p]rogress toward or achievement of advanced degrees" as a criterion for tenure. To that extent the result is consistent with the University of Rhode Island awards. *Cf.* University of Hawaii v. University of Hawaii Professional Assembly (Grievance of Dr. A) (March 31, 1976) (Tsukiyama, Arbitrator) where the grievant's departmental recommendation for tenure (but not promotion) had been concurred in by several layers of faculty and administrative review but rejected at the final administrative stage. The contract provided for review under a standard of arbitrariness. The arbitrator held the stated ground not to be arbitrary; the reason for reversal was disagreement that the grievant's teaching and institutional service outweighed an undisputed poor record as a researcher. The arbitrator rejected the argument that the faculty judgment should be given primary weight, because no such standard was explicitly incorporated in the contract. Thus it is inconsistent with the approach in the above University of Rhode Island cases. The arbitrator buttressed the result by reasoning that, "[e]ach level of review was expected to render [an] independent judgment." *Id.* at 18. Since all review past the departmental level

requirement, created by the arbitrators in aid of analysis, essentially builds upon the peer judgment system and anticipates administrative concurrence save in rare and compelling cases. The Bridgeport award also attempts to limit the scope of arbitral scrutiny by ignoring precisely that requirement built into the collective agreement. Thus, the award holds that management was within its "prerogative" and arbitral examination was foreclosed.[79]

(2) *Faculty Dismissal and Discipline.*

A challenge was presented to the issuance of formal reprimands to two faculty members at Schoolcraft College, a two-year institution in Michigan.[80] The grievants had been denied tenure without consideration of the formal evaluation prepared for each of them pursuant to the collective agreement. Their personal conduct, which the administration believed had a direct bearing on the teacher-student relationship and which was the subject of the reprimands, was the basis for the denial. The arbitrator held the refusal to consider these evaluations to be a violation of the agreement and ordered the faculty members reinstated. In so doing, however, he observed that in exercising the contractual prerogative of awarding tenure, the administration was not limited solely to the evaluation, which limitation would have the effect of rendering the "prerogative" meaningless. He concluded that the administration could validly take into account any conduct which would constitute adequate cause for the termination of a tenured appointment. Such conduct was specified in the contract as gross immorality or lapse of professional integrity. The assessment of any other conduct would, he reasoned, effectively hold nontenured faculty to a higher standard than tenured. Accordingly, he turned to the propriety of the challenged action.

One of the reprimands was based on an article a grievant wrote for the school newspaper under a byline indicating that he taught in the college. The article, reproduced in substantial measure in the award, is fairly characterized by the arbitrator as being "critical of colleges in general and Schoolcraft College in particular," although it is arguable whether the average academic would agree with the arbitrator that the criticism is "severe."[81] The article

was limited to the materials prepared for and considered by those most proximate to the candidate, the arbitrator's reasoning seems clearly erroneous. However, the result might well have been the same even had the faculty view been considered "primary."

79. This approach was also taken in University of Rhode Island AAUP v. Rhode Island Bd. of Regents, AAA Case No. 1139-0678-73 (Feb. 26, 1974) (Fallon, Arbitrator) holding, contra to prior practice, that "the administration has a right to exercise its managerial authority reasonably, in the best interest of academic efficiency" in assigning the grievant to teach extension courses. *Id.* at 7.

80. Board of Trustees of Schoolcraft College v. Schoolcraft College Faculty Forum, AAA Case No. 5440-0177-69 (Aug. 22, 1969) (Herman, Arbitrator) [not currently on file]. One of the reprimands concerned the signing of a poster by both teachers along with some tenured members of the faculty, about which the arbitrator expressed his negative reactions. Inasmuch as this matter was the subject of a grievance submitted by the reprimanded tenure faculty, the arbitrator permitted the instant reprimands to stand or fall upon the outcome of that proceeding. This author has not been able to obtain that award. Another incident concerned one of the grievant's abrupt departure from a student ski excursion on which she was serving as a voluntary chaperone in order to show her displeasure with student conduct. The third is treated in the text.

81. *Id.* at 10.

called for students to examine the purpose served by the college. Students were asked to inquire whether the college encouraged and provided an environment for learning or served to hinder or even repress inquiry. If the answer to the latter was affirmative, the article suggested that the school be closed by the faculty and students.

Upholding the reprimand, the arbitrator found the article "lacking in mature judgment" which "[could not] but be understood from a reading of the article that he, the author, consider[ed] the school to be of little or no value to its students."[82] To the argument that the publication was a constitutionally protected activity, the arbitrator responded that the grievant was asked to write the article "because of his interest in the school and its pedagogical programs not as a disinterested citizen." He concluded that the grievants' "rights as citizens must be respected, but their conduct as teachers as it affect[ed] their school [was] subject to managerial control."[83]

Unlike reasonableness or arbitrariness the imposition of discipline under a standard of "lapse of professional integrity" can draw on substantial professional experience and some judicial experience with defining the bounds of permissible and impermissible professorial conduct. From this perspective the arbitrator seems rather clearly to have breached both the grievants' academic freedom[84] and first amendment rights.[85]

A similar insensitivity is found in the award of an arbitral panel selected outside the context of collective bargaining to resolve one of the more celebrated recent academic controversies. In mid-December 1965, the administration of St. John's University (N.Y.) notified thirty-three faculty members of the nonrenewal of their appointments, and twenty-two of them were immediately relieved of all classroom assignments. Following a faculty

82. *Id.* at 21.

83. *Id.*

84. Violations of academic freedom have been determined by the profession largely through the investigations and reports of the American Association of University Professors. *See Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1105-12 (1968); Finkin, *supra* note 18, and the sources cited therein. Based on the precedents developed under the profession's "customary law" it is clear that the arbitrator breached the grievants' academic freedom. *See Academic Freedom and Tenure: Alabama Polytechnic Institute*, 44 AAUP BULL. 158 (1958); *Academic Freedom and Tenure: The University of Illinois*, 49 AAUP BULL. 25 (1963); *Academic Freedom and Tenure: Oklahoma State University*, 56 AAUP BULL. 62 (1970). A recent report pointed out: "Any proponent of change in an institution or in society generally is likely to encounter resistance, and the iconoclast who confers his blessing on unconventional means for achieving unwelcome reforms is sure to arouse criticism." *Academic Freedom and Tenure: University of Florida*, 56 AAUP BULL. 405, 413 (1970). Nevertheless, the report stressed, "One of the risks of allowing a university to foster academic freedom is that teachers and students alike may advocate and act on new and controversial views of all manner of things." *Id.* *See also* Emerson & Haber, *Academic Freedom and the Faculty Member as Citizen*, 28 LAW & CONTEMP. PROB. 525 (1963).

85. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); Skehan v. Board of Trustees, 501 F.2d 31, 39-40 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975). ("If it [the court] were to find that the decision not to renew his contract was based on stands on campus issues with which the administration disagreed, the nonrenewal decision would be substantively defective under the first amendment . . . ."); State *ex rel.* Richardson v. Board of Regents, 70 Nev. 347, 269 P.2d 265 (1954); State *ex rel.* Ball v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959). *See generally* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841; Note, *Teachers' Freedom of Expression Outside the Classroom*, 8 GA. L. REV. 900 (1974).

strike, the initiation of law suits, the investigation, report and censure of the American Association of University Professors, and an order by the Middle States Association of Colleges and Secondary Schools to show cause why accreditation should not be revoked, the university offered to submit the matter to a three-member panel for arbitration. The standard for determination in the case of the first of fourteen faculty accepting the terms of arbitration was "whether under all of the circumstances then prevailing the Board of Trustees . . . acted reasonably" in not reappointing the grievant and in immediately relieving him from classroom assignment.[86]

The board of trustees argued that it had the right to make critical determinations on the utilization of faculty so long as proper notice standards were observed and full salary for the period of appointment was paid. Since the notice of intent not to reappoint for the 1966-67 academic year was not effected as required under university standards by October 1, 1965, the arbitrators held that the faculty member was entitled to believe himself reappointed for an additional academic year.[87]

More significantly, the trustees argued they had a right to take the disputed action since they considered the grievant "to be a disruptive influence." They alleged he had sought both to alter radically the relationship of the university to the Catholic Church and to give the faculty final control of its educational program. The grievant, on the other hand, argued that the nonrenewal was the result of his activities in support of a teachers' union and it therefore infringed upon his academic freedom.

The arbitration panel held that the grievant had the right as a matter of academic freedom to challenge the institution's relationship to the church, and to espouse faculty control of the curriculum, "provided only that he exercise such right in proper circumstances."[88] They found no evidence, however, that the university attempted to limit the exercise of academic freedom or that the nonrenewal was based on the grievant's union activity. Rather, the panel found that the grievant "engaged in a course of conduct which was unbecoming to his role as a university professor"[89] and which "would have supported a dismissal" had the university chosen to press charges of unprofessional conduct through its established procedures.[90] The incidents summarized in support of this conclusion consisted of public utterances challenging the authority of various university officials, the distribution of written material challenging the university, solicitation of student support by picketing, distributing leaflets, and use of a public address system, and the carrying of picket signs across the campus "in full clerical garb."[91]

Two additional incidents were specifically cited by the panel as buttressing

86. St. John's University v. Peter O'Reilly, AAA Case No. 1310-0343-68 (Jan. 22, 1970) (Root, Rivlin & Gates, Arbitrators). The entire proceedings, including conferences, required 13 days and resulted in 1700 pages of transcript and hundreds of pages of documentary evidence.

87. The university had, however, terminated the grievant effective June 30, 1967, and paid him for that period.

88. *Id.* at 6.

89. *Id.* at 7-8.

90. *Id.* at 11.

91. *Id.* at 8.

its conclusion. First, the grievant, as chairman of a special faculty committee, had submitted for the consideration of a wider faculty body a statement on academic freedom based on a statement prepared by the American Civil Liberties Union. He had characterized the modifications to the ACLU statement as "slight," but later, in the course of the arbitration hearing, agreed that they were "material." The panel concluded that the grievant was "guilty of a lack of candor" and that his characterization of the modification "showed either such poor judgment or so low a level of professional ethics as to constitute conduct unbecoming a professor."[92] Secondly, in November 1965 the grievant had joined with seventeen other members of his department in advertising in the *New York Times* their availability for appointment elsewhere. The panel concluded that the grievant was either guilty of joining a misleading advertisement or "that he would have had no hesitation in breaching his contract if he found a suitable job elsewhere."[93]

Accordingly, the panel held that the university had acted reasonably in the decision not to renew. Inasmuch as the university had failed to comply with its own regulations requiring charges and a hearing before suspension, the panel held the suspension unreasonable. On the question of relief, however, the panel found no basis for money damages since the grievant's full salary had been paid. The equitable remedy by way of reinstatement, urged by the grievant's counsel as necessary to remove the "chill which the actions of the University have placed on academic freedom," was rejected. The panel, noting its conclusions concerning the grievant's conduct, observed that he who seeks equity must come with clean hands.

A degree of internal inconsistency exists in this award.[94] Having found the purposes for the grievant's activities protected by academic freedom, the panel scrutinized the grievant's conduct in the light of both academic freedom and the standard of "conduct unbecoming" a university professor. The panel, however, cited neither authority nor the custom of the academic profession to justify its conclusion on the propriety of the grievant's conduct. Thus, the university's arguments for nonrenewal summarized in terms of the grievant's conduct and, more specifically, in terms of the substance of what he had sought to achieve demonstrate that considerations violative of academic freedom clearly played a significant role in the university's decision. Further, the panel, in deciding whether a remedy was warranted, gave no consideration to the institution's total disregard of its suspension and dismissal procedures.

A similar eliding of the procedural aspects of a dismissal is found in an award arising out of Bryant College, a private institution in Rhode Island.[95]

92. *Id.* at 10.
93. *Id.* at 11.
94. These are treated in detail in a critique of the award published by the grievant's union. Why St. John's University Must Remain on the AAUP List of Censured Institutions: A Communication to the American Association of University Professors from the United Federation of College Teachers, Local 1460, American Federation of Teachers (AFL-CIO) (Undated).
95. Bryant Faculty Fed'n, Local 1769, AFT, AFL-CIO v. Bryant College of Business Adm'n, AAA Case No. 1130-0405-71 (Oct. 11, 1972) (Fallon, Arbitrator).

The grievant, a tenured professor and union leader, had accepted a second full-time position as a union staff member. The administration, citing college policy, demanded that he resign one of the positions and upon his refusal to comply presented the matter to the faculty's hearing committee. Under the faculty manual, departures from which are arbitrable under the collective agreement, a faculty member must prior to dismissal be given a notice of charges and a hearing before a faculty committee whose recommendation is advisory to the president. Accordingly, the matter was presented to the faculty committee and both parties were heard on November 8, 1971. On the same date the administration gave the hearing committee until 10:00 a.m. on November 11 to tender its recommendation. Although the administration was advised on November 11 that a joint meeting of the hearing committee and the faculty executive committee was scheduled for November 15, the administration summarily dismissed the grievant.

The arbitrator held that adequate cause existed to dismiss the individual under the college's faculty manual, and that the union had failed to show that the dual employment policy was not consistently and uniformly applied. Perhaps more important, he held that the administration's time demand was "eminently reasonable," that there was no "moderately good reason" for the faculty delay, and that the committee's failure to comply with the ultimatum constituted a waiver of the procedural requirement.

> The . . . [faculty] Committee cannot prevent the administration from taking what it considers to be necessary termination action by delaying a recommendation to the President. To allow such a tactic to succeed would be to permit a faculty committee authority, under the guise of due process and strict adherence to procedural requirements, to intrude on management's contractual right to discharge for what it considers to be just cause.[96]

Indeed, he strongly supported that action as a justified management response to an insubordinate employee. Of course, the result might have been the same had the arbitrator ordered the matter returned to the hearing committee for its recommendation, inasmuch as that report would have been only advisory. Moreover, the result on the merits of the discharge may be sound. Nevertheless, a faculty hearing committee would have been in a better position than the administration to know of actual institutional practices respecting outside employment.[97] Even if the facts found by the arbitrator were correct, the faculty committee had an important contribution to make in determining whether in light of the faculty member's contribution to the

96. *Id.* at 16.

97. *Cf.* Cook County College Teachers' Union v. Chicago City College Board 508, AAA Case No. 51-30-0272-68 (Dec. 27, 1968) (McGury, Arbitrator) (a teacher cannot be dismissed for holding two full-time positions in the absence of a clear rule against it and where there was "no attempt to prove that the grievant's prior teaching load had any adverse effect on his teaching . . . ." *Id.* at 9). *See also* Ferris State College v. Ferris State College Faculty Ass'n, AAA Case No. 5439-0486-74 (Nov. 2, 1974) (Roumell, Arbitrator) (sustaining the adoption of a rule requiring prior administrative approvals for outside remunerated activities without bargaining with the faculty bargaining agent inasmuch as the collective agreement permitted the administration to adopt "reasonable policies").

institution in the past the penalty of dismissal or some lesser sanction should have been imposed. It is conceivable that the entire dispute would have been obviated once the grievant had the benefit of a faculty position on the correctness of the administration stand. But more important than the specific outcome of this case is the fact that the failure to give sufficient weight to the faculty hearing procedure, indeed the denigrating treatment of it, simply eviscerates the fundamental guaranty that professional judgments will have a voice on matters as critical as the dismissal for cause of a tenured faculty member.[98]

(3) *Discrimination Due to Union Activity.*

Since arbitrators may have more experience in dealing with violations of provisions prohibiting discrimination due to union activity than with determining the merits of faculty status decisions in higher education, one would expect less perplexing treatment of this issue. In one instance the grievant alleged that the failure of the administration to appoint him as a department chairman in one of the Chicago city colleges, after a recommendation by the faculty, was due to anti-union discrimination.[99] The arbitrator noted that the grievant had been an active anti-administration advocate and observed that "vigorous union activity and pressure for goals of a union must necessarily normally be anti-administration or anti-management."[100] He found that the grievant's union activities were "a significant source" of one of the dean's reasons for refusing to appoint the grievant as department chairman. Nevertheless, the arbitrator decided that the anti-union discrimination was not the sole and exclusive basis for the adverse decision and, therefore, refused to sustain the charge.

This contrasts with an award in CUNY concerning an allegation of a violation of the nondiscrimination clause in the decision not to renew a lecturer in the City College of New York.[101] The grievant had been issued a notice of nonreappointment which was subsequently rescinded with a caution that his status would be reviewed carefully. An intensive series of classroom observations by faculty members was initiated which departed in some respects from the procedural evaluation requirements of the contract. The grievant thereupon initiated an administrative appeal as provided for in the grievance procedure, and the matter was ordered returned for procedural compliance, following which the department's personnel committee reaf-

98. *Cf.* Mendez v. Trustees of Boston Univ., 285 N.E.2d 446 (Mass. 1972). *But see* New York Institute of Technology v. Council of Metropolitan & Old Westbury Chapters AAUP, AAA Case No. 1330-1461-75 (Dec. 5, 1975) (Friedman, Arbitrator) (a faculty member's failure to appear in time to commence the academic year was not tantamount to a resignation and, thus, the dismissal procedure, requiring a faculty hearing, had to apply). Arbitrator Friedman's opinion holds together a good deal better than the more artificial reasoning of the Massachusetts Supreme Judicial Court.

99. Board of the Junior College, Dist. 508, Chicago, Illinois v. AFT Cook County Teachers Union, Local 1600, AAA Case No. 5130-044-68 (July 9, 1968) (Davis, Arbitrator) [not currently on file].

100. *Id.* at 7.

101. Board of Higher Educ. of the City of New York v. United Fed'n of College Teachers, AFL-CIO, Local 1460, AAA Case No. 1330-0282-70 (June 24, 1971) (Rubin, Arbitrator) [not currently on file].

firmed its earlier negative judgment. The grievant then pursued the matter as a violation of the agreement's guarantee of non-discrimination for union activity.

The grievant had been both an undergraduate and graduate student in the department and was well-known to many professors, some on the appointments committee, but not to the new chairman who seemed ignorant of some aspects of the grievant's career. In support of the department's judgment the chairman testified to the meagerness of the grievant's output in the discipline,[102] and memoranda from faculty observers were submitted to establish inadequacies in the grievant's teaching. The arbitrator noted, however, that the grievant's department had been undergoing change; the selection of a new chairman coincided with a shift in the teaching direction of the department and in curriculum changes affecting the employment of faculty members holding lecturerships. The grievant served as chairman of the union grievance committee on his campus and in that capacity was at the center of charges of contract violation against his own department. Thus, the arbitrator concluded that the grievant "became the focus of the turmoil of the Department's changes, as the officer of the Union, as a Lecturer vulnerable to curriculum changes and as [a member of the discipline] evidently opposed to the teaching changes."[103] These factors culminated in a consensus among the members of the department that the grievant, "the active unionist and gadfly,"[104] was no longer wanted. The arbitrator supported this conclusion by citing examples of anti-union bias on the part of faculty members evaluating the grievant: one member admonished the grievant that his union activity "actively interfered with his development" in the discipline; another expressed the conviction that lecturers should not be allowed to secure tenure (one of the union goals); and, the department chairman criticized the role of the union in obstructing his plans for the department and the grievant's part as a union spokesman.[105]

The arbitrator took note of the difficulty of proving discrimination for union activity. The determination "must by necessity be derived from the balancing of the substantial evidence consisting of instances of both proper and improper actions . . . ."[106] There was an "interlacing of displeasure with the grievant as an official of the Union and with him as a teacher."[107] The academic department's consideration of the grievant was, he concluded, "tainted by the Department's bias . . . stemming from disapproval of the union and his activities."[108]

A critical difference exists between the above case and the standard adopted by the arbitrator in the Chicago City College chairman case, in

102. The arbitrator held that the department's publication requirement was a matter of academic judgment rather than improper age discrimination. He observed, however, that in view of the grievant's "late realization of . . . training in the same college, perhaps departmental expectation of disciplinary production should be more reflective of individual situations of the faculty members." *Id.* at 17.

103. *Id.* at 22.

104. *Id.* at 24.

105. *Id.*

106. *Id.* at 25.

107. *Id.*

108. *Id.*

which there also was an interlacing of permissible and impermissible considerations. In the City College of New York case the arbitrator did not determine that union activity was the *sine qua non* for the decision; rather, the award stated that anti-union bias "tainted" the decision. In the Chicago case, however, there was a finding that the improper ground was not the sole and exclusive basis for the decision.

Although there may be no reason to criticize the merits of the CUNY award on the basis of all the evidence heard by the arbitrator, the institutional implications of the adopted standard warrant attention. Faculty committees and administrations may, under the CUNY approach, become more circumspect in their dealings with faculty union activists, and a natural caution may deter firm judgments on the academic merits of borderline cases in order to avoid the turmoil and expense of arbitration. As noted in the discussion of the Schoolcraft reprimand case, academic freedom is understood to extend to activities critical of institutional policies. Since collective bargaining will have a critical bearing on educational policy, it follows that academic freedom also protects those individual faculty members critical of the union's activities in this regard. This protection encompasses a professor's right to state publicly his opposition to union goals or methods affecting the administration of his own department, as in stating the view that a lectureship should not be a tenure-bearing position. The arbitrator in the City College case did not distinguish statements by the department chairman or senior colleagues merely reflective of anti-union animus from expressions of opinion on institutional policy subject to negotiation with the union.

Interestingly, the right of intramural speech and activity has been at least partially recognized under the CUNY agreement in an award concerning the failure to assign teaching duties to and the subsequent nonrenewal of another lecturer.[109] The individual had been an active participant in a conflict with the administration in one component of the City University and had been involuntarily transferred from that unit to an academic department not in his discipline at the City College of New York. The receiving department declined to assign teaching duties to an individual who had not been selected and approved by it. During this controversy the grievant and a number of others petitioned the university's faculty senate for a hearing, alleging that their terminations in the previous program were for reasons violative of their academic freedom. The senate's hearing committee agreed.[110]

The arbitrator, reciting the hearing committee's report in detail, found that the grievant "was considered by members of the administration to be 'politically motivated' and that adverse action was taken . . . on that basis."[111] Accordingly, he reasoned that the prohibition on non-discrimina-

109. United Fed'n of College Teachers, Local 1460, AFL-CIO v. Board of Higher Educ. of the City of New York, AAA Case No. 1339-0893-70 (Nov. 30, 1971) (Christensen, Arbitrator).

110. The circumstances of the conflict are discussed in *Academic Freedom and Tenure: City University of New York (SEEK Center)*, 60 AAUP BULL. 67 (1974).

111. United Fed'n of College Teachers, Local 1460, AFL-CIO v. Board of Higher Educ. of the City of New York, AAA Case No. 1339-0893-70, at 18 (Nov. 30, 1971) (Christensen, Arbitrator).

tion for "political belief" found in the agreement "fully comprehends internal institutional politics as well as the broader areas."[112] He concluded that "it was the political motivation and beliefs of the grievant as expressed in these internal institutional conflicts which led to the complex of actions which left him as a teacher with no one to teach."[113]

These CUNY awards suggest that although freedom of intra-institutional expression may be contractually protected, utterances by senior faculty members at variance with union goals or policies may be relied on by an arbitrator in reversing a department's judgment affecting the status of a militant unionist. The contractual guarantee may then be of limited value, given the likelihood that senior faculty will refrain from open criticism if their "protected" expressions may be put to such a use by the arbitrator. Thus, even in an area where there is no dearth of arbitral experience, determinations on the quantum and character of the evidence considered may have serious implications for the conduct of academic government.[114]

(4) *A Reassessment.*

Returning to the questions posed at the outset of this section, if the arbitrator is to reach the merits of the academic decision (putting aside the phrasing of arbitral standards), upon what assumptions does he proceed and to what sources does he look as a guide to decision? On the former, two rather fundamentally different arbitral approaches are reflected in the awards surveyed. The first, best exemplified in the University of Bridgeport,[115] Bryant College,[116] NYIT,[117] and the later Southeastern Massachusetts University[118] awards, proceeds on the industrial assumption of management's inherent right to make personnel decisions, equating management to

112. *Id.*

113. *Id.* at 16. A companion case concerned the nonrenewal of a fellow lecturer who had also been transferred and was among the group dealt with by the senate's report. Unlike the case under discussion, his department did assign teaching duties and reached a negative evaluation, albeit with a procedural error which was remedied following an administrative appeal. In the companion case, the arbitrator found the record devoid of evidence that other than an academic judgment was involved, noting: "The fact that the Grievant was engaged in a bitter dispute with one portion of the college administration . . . does not make a prima facie case that a decision not to reappoint him by another branch of that administration is automatically invalid." United Fed'n of College Teachers, Local 1460, AFL-CIO v. Board of Higher Educ. of the City of New York, AAA Case No. 1339-0891-70, at 16 (Nov. 30, 1971) (Christensen, Arbitrator).

114. *See also* Wayne County Community College Fed'n of Teachers, AFT, Local 2000 v. Wayne County Community College Bd., AAA Case No. 5439-0471-71 (Nov. 12, 1971) (Ahearn, Arbitrator), in which the arbitrator concluded that although an honest judgment had been formed concerning the faculty member, the department's reliance on an unrepresentative sample of student opinion, some of which reflected racial bias (the candidate was from the Near East), required remedy because the college may by that reliance have "unwittingly discriminated" against the grievant on the basis of race. *Id.* at 18.

115. University of Bridgeport v. AAUP, AAA Case No. 1239-0069-75 (Aug. 18, 1975) (Zack, Arbitrator).

116. Bryant Faculty Fed'n Local 1769, AFT, AFL-CIO v. Bryant College of Business Adm'n, AAA Case No. 1130-0405-71 (Oct. 11, 1972) (Fallon, Arbitrator).

117. New York Institute of Technology v. Council of Metropolitan and Old Westbury Chapters AAUP, AAA Case No. 1330-0635-75 (March 18, 1976) (Knowlton, Arbitrator).

118. Board of Trustees, Southeastern Massachusetts Univ. v. SMU Faculty Fed'n, Local 1895, AFT, AAA Case No. 1139-9528-70 (April 6, 1971) (Zack, Arbitrator).

the administration or governing board.[119] While the collective agreement or institutional policy incorporated by the agreement might subject those decisions to procedural or substantive limitations, these in turn are construed narrowly or not closely examined as a seeming derogation from management prerogative. What is not accommodated, perhaps for the want of industrial analogies, is the system of faculty participation in the merits of personnel decisions and the academic values underpinning that participation. As a result, the fact of faculty participation is given little weight and the governance system is reduced to formalism.[120] Inevitably, faculty unions and arbitrators themselves will press for more detailed contractual language.[121]

119. This approach is also reflected in the following cases: Bryant College Faculty Fed'n, Local 1769, AFT, AFL-CIO v. Bryant College of Business Adm'n, AAA Case No. 1130-0313-75 (Oct. 17, 1975) (Teele, Arbitrator); Macomb County Community College v. Macomb County Community College Faculty Org'n, AAA Case No. 5439-0849-74 (Feb. 6, 1975) (Herman, Arbitrator) (a contractual prohibition on disciplinary suspensions without a prior hearing but allowing for withholding of salary "in the event the matter has not been adjudicated by the end of the academic year" applicable solely to short-term suspensions but not to a suspension without pay for an entire year); University of Rhode Island AAUP v. Rhode Island Bd. of Regents, AAA Case No. 1139-0678-73 (Feb. 26, 1974) (Fallon, Arbitrator); Senate Professional Ass'n v. New York (State Univ. of New York at Binghamton), OER File No. PS-SU-BI-1 (Jan. 22, 1973) (Yagoda, Arbitrator).

120. *See also* Board of the Junior College, Dist. 508, Chicago, Ill. v. AFT Cook County Teachers Union, Local 1600, AAA Case No. 5130-0044-68 (July 9, 1968) (Davis, Arbitrator), where the arbitrator observed with respect to the reasons for the administration's non-concurrence in the selection of the faculty's preferred candidate:

> Some of these reasons may not have been considered valid by the department faculty or, possibly, even by an impartial observer. But, pursuant to present contract provisions, it is the dean's opinion of qualifications that counts. His qualitative judgment, be it emphasized, is not by contract subject to review by the faculty or by an impartial evaluator.

Id. at 7. However, other arbitrators have struck slightly different balances. *See, e.g.*, Seattle Community College, Dist. VI, Seattle, Washington v. Seattle Community College Fed'n of Teachers, AAA Case No. 7539-0025-71 (Nov. 29, 1971) (Peterschmidt, Arbitrator) (where procedures requiring faculty recommendation of two candidates for the department chairmanship, one of whom was appointed by the president, were complied with and the arbitrator declined to review the merits of the complaint by the dissatisfied candidate); Faculty Fed'n of Erie Community College v. Erie Community College, AAA Case No. 14-39-0146-73 (Aug. 23, 1973) (Doherty, Arbitrator) (written reasons must be provided by the administration for its refusal to select a faculty recommended appointment only where it disfavored any of the faculty's nominees, not where it selected a nominee approved but not preferred).

121. One of the arbitrators in CUNY has called for more explicit standards, noting that "instructions which are ambiguous such as 'professional incompetence' or, particularly, 'academic judgment' are simply a temptation to give us more authority that [*sic*] we probably should have." Christensen, *Due Process and Academic Judgment*, in PROCEEDINGS OF THE FIRST ANNUAL CONFERENCE, NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION 104, 107 (M. Benewitz ed. 1973). The successor CUNY agreement clarified its limitation on arbitral authority which seems, however, to do no more than codify what the arbitrators had concluded:

> '[A]cademic judgment' shall mean the judgment of academic authorities (including faculty, as defined by the Bylaws, and the Board) (1) as to the procedures, criteria and information to be used in making determinations as to appointment, reappointment, promotions, and tenure and (2) as to whether to recommend or grant appointment, reappointment, promotions and tenure to a particular individual on the basis of such procedures, criteria and information. In the arbitration of any grievance of action based in whole or in part upon such academic judgment, the Arbitrator shall not review the merits of the academic judgment or substitute his own judgment therefor, provided that the Arbitrator may determine (i) that the action violates a term of this Agreement, or (ii) that it is not in accordance with the Bylaws or written policies of the Board, or (iii) that the claimed academic judgment in respect of the appointment, reappointment, promotion

However, accretions of increasingly complex contractual regulation will perforce accelerate the "contract focus"[122] and thus encourage an attitude of "creeping" if not "galloping" legalism between faculty and administration.[123]

The second line of cases, best exemplified in the Oakland University[124] and University of Rhode Island awards,[125] reflects a more sophisticated and realistic approach.[126] These decisions recognize that the arbitrator is an agent for an academic government not conducted by collective bargaining in which decision-making responsibility is *shared* between faculty and administration. The arbitral role, substituting adjudication for political suasion, is to assure the integrity of the governance system. Thus, the fact of a bargaining relationship and considerations of labor policy, so persuasive in the "industrial" line of cases, are simply irrelevant to the disposition of these kinds of disputes.[127]

---

or tenure of a particular individual in fact constituted an arbitrary or discriminatory application of the Bylaws or written policies of the Board.

Agreement between the Professional Staff Congress/CUNY and the Board of Higher Education of the City of New York § 20.5(b) (1973).

122. The "contract focus" is illustrated in one award in which the arbitrator, faced with a request by the parties to an agreement for a "declaration of rights" defining the permissible circumstances under which the contractual right of involuntary transfer of faculty could be exercised, observed that "arbitrators (like water) cannot rise above the source of their authority which is the 'agreement' of the parties as represented in their signed documents or . . . by a clear pattern of mutual conduct." Board of Junior College Dist. No. 508, County of Cook, and State of Illinois v. Cook County College Teachers' Union, Local 1600, AFT, AFL-CIO, AAA Case No. 5130-0324-69 (June 5, 1970) (Seitz, Arbitrator) [not currently on file]. He expressed an understanding of the reasons why the administration should feel a need for reserving a right of involuntary transfer in the future. He also demonstrated an understanding of the faculty's interest in protecting its academic freedom and defending itself from actions detrimental to its economic or professional interests. "The answer," he stated, "lies in a careful balancing of these two interests. The balancing can best be accomplished not by resort to vague and general concepts not mutually accepted or to such theories as the sovereignty of public bodies borrowed from theories of the nature of the State or the reserved rights theory of labor-management relations, *but by a careful examination of the Agreement.*" *Id.* (emphasis added). The arbitrator declined to inform them what their agreement meant. *See also* Pennsylvania v. Association of Pennsylvania State College and University Faculties, 65 Lab. Arb. 910 (1975) (Glushien, Arbitrator) (declining to issue a declaratory judgment in the absence of a contest on the merits); Lansing Community College Chapter, MAHE v. Board of Trustees of Lansing Community College, AAA Case No. 5439-228-71 (June 9, 1971) (Heilbrun, Arbitrator) (issuing a declaratory judgment concerning the adoption of student evaluation procedures in the absence of their application in any contested personnel decisions).

123. Fuller, *Two Principles of Human Association,* NOMOS XI, at 3 (1969). For more on the dangers to academic values posed by the notion of "going by the book" see R. CARR & D. VAN EYCK, *supra* note 1, at 224-25, 237-39, and Kadish, *The Theory of the Profession and Its Predicament,* 58 AAUP BULL. 120 (1972).

124. Oakland Univ. Chapter AAUP v. Oakland Univ. (May 17, 1974) (Smith, Arbitrator).

125. University of Rhode Island, AAUP v. Rhode Island Bd. of Regents, AAA Case No. 1139-0161-73 (Oct. 8, 1974) (Stutz, Arbitrator); University of Rhode Island, AAUP v. Rhode Island Bd. of Regents, AAA Case No. 1139-0070-74 (Sept. 4, 1974) (Stutz, Arbitrator); American Ass'n of Univ. Professors v. Board of Regents (R.I.), AAA Case No. 1139-0798-73 (Aug. 16, 1974) (MacLeod, Arbitrator).

126. This approach is also reflected in the following cases: Y.I. v. University of Hawaii (Feb. 10, 1976) (Conklin, Arbitrator); Professor N. v. Northeastern Univ. (July 21, 1975) (Kennedy, Arbitrator); Onondaga Community College Fed'n of Teachers, Local 1845 v. Onondaga Community College, AAA Case No. 15-37-0151-73 (Sept. 14, 1973) (Dennis, Arbitrator).

127. For example, Northeastern University has pursuant to a recommendation of its Faculty Senate adopted a grievance-arbitration procedure for faculty status disputes. A grievance is defined as an allegation of discrimination due to age, sex, race, religion, national origin, or marital status, a violation of academic freedom, a dismissal "without

The difference in these approaches is reflected as well in the sources looked to for decision. The "industrial" line of cases relies most heavily on the fact of a bargaining relationship and tends to ignore the larger goals of maintaining a system of academic government resting heavily on faculty participation. While some results may be more arguable than others, given the vagaries of contract language, the University of Bridgeport, NYIT, and Bryant College awards seem almost dogged in this regard. Moreover, in the academic freedom cases at Schoolcraft College and St. John's University the awards do not look at all to academic norms or practice, a curious omission in a system which theoretically takes account of the "common law of the shop." One explanation may be that the "common law" is thought of as being supplied in arbitration awards themselves; thus the absence of any significant arbitral experience has thrown these arbitrators largely on their own resources and back to industrial assumptions.

On the other hand the University of Rhode Island and Oakland University awards place great weight on the institutional demands of the governance system, and the first Southeastern Massachusetts University award,[128] as well as others,[129] rely heavily on the significance of academic practice as indispensable to arbitral disposition. This underlines the close relationship between the arbitral function and the personal qualifications of the arbitrator; if the arbitral standards delegate academic decision-making authority, then sensitivity to the academic milieu is a requirement for a workable system.[130] The impact of arbitral value judgments on academic processes is underlined as well in the fashioning of an appropriate remedy.

---

just cause," a denial of "due process" in consideration for tenure, promotion, or reappointment, a misinterpretation or inequitable application of institutional policy, or unfair or inequitable treatment. Final Report of the Northeastern University Faculty Senate on Grievance Procedures § 6-01 (April 25, 1973). In essence, this out-of-collective bargaining grievance-arbitration procedure is indistinguishable from what a collective agreement would provide.

A most curious variation is found in the grievance procedure established without collective bargaining by Executive Order 201 of the Chancellor for the California State University and College System (July 10, 1974). Under this procedure a faculty grievance committee or, at the grievant's option, a hearing officer decides whether there was a substantial procedural departure, whether favorable evidence was ignored, or whether "no reasonable, unbiased person faced with the same facts could have taken the action" complained of. The resulting report is advisory to the campus president and if he fails to accept the recommendation, arbitration is available to determine whether the president's rejection of the report was arbitrary. This rather convoluted two-stage procedure has been characterized as "ponderously inefficient" by a close observer of the academic scene. Peairs, *For Further Information*, in R. PEAIRS, *supra* note 12, at 85, 87.

128. SMU Faculty Fed'n Chapter 1895, AFT v. Board of Trustees, SMU, AAA Case No. 1139-0490-70 (March 10, 1971) (Kennedy, Arbitrator) [not currently on file].

129. *See, e.g.*, The first award under the Northeastern University procedures, defining "due process" essentially in academic terms, Professor N. v. Northwestern Univ. (July 21, 1975) (Kennedy, Arbitrator).

130. Rather little has been done by way of close scrutiny of arbitral awards. *Compare* Gross, *Value Judgments in the Decisions of Labor Arbitrators*, 21 IND. & LAB. REL. REV. 55 (1967), *with* Seitz, *Value Judgments in the Decisions of Labor Arbitrators*, 21 IND. & LAB. REL. REV. 427 (1968). *See also* Alexander, *Reflections on Decision Making*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE, PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 1 (R. Kahn ed. 1962); Getman, *The Debate over the Caliber of Arbitrators: Judge Hays and His Critics*, 44 IND. L.J. 182 (1969).

C. *Remedies*

Where a substantive contractual guarantee, such as non-discrimination, has been breached, reinstatement has been afforded. A more difficult remedial issue is posed when the evaluation procedures have been misapplied or not followed. In one case the collective agreement provided that the "views" of the academic department be communicated to the administration. The arbitrator, therefore, concluded that more than a tally of the department's secret ballot vote was required.[131] Accordingly, he ordered the grievant reinstated. The case is colored somewhat by the fact that false information was circulated to the department just prior to its vote and to which the grievant was unable to respond. Thus, the "due process" attendant to the departmental consideration was held to be violated.[132] The arbitrator could have ordered a reconsideration without reinstatement, inasmuch as the initial consideration arguably would not have produced a different result even had the deleterious information not been circulated and had the department drafted a written statement of its views rather than obtaining a simple majority vote. The remedy imposes a sanction on the institution for procedural error in order to insure more careful procedural compliance in the future.[133]

The CUNY approach, however, forecloses this or similar results by limiting the arbitrator's authority in instances of procedural error to remand for procedural compliance. That distinction has not proved altogether satisfactory. In a close case an instructor in Brooklyn College of the City University was denied reappointment which would have resulted in the acquisition of tenure.[134] The decision was made by the department without

131. Board of Junior College Dist. 508, AAA Case No. 5130-0165-69, 53 Lab. Arb. 530 (Aug. 19, 1969) (Sembower, Arbitrator).

132. The administration argued that it should not be held responsible for errors committed by the faculty of an academic department, *i.e.*, that the matter was an intra-unit dispute. The arbitrator described the faculty's role as a "hard-won prerogative" for which the governing board "in the role of management, undoubtedly has little enthusiasm." He held that the board nevertheless "has the clear responsibility to refuse to follow any procedure which it knows will deny 'due process' or is otherwise invalid." *Id.* at 535.

133. *See* Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1220 (1962). In Wayne County Community College Fed'n of Teachers, AFT, Local 2000 v. Wayne County Community College Bd. of Trustees, AAA Case No. 5439-0471-71 (Nov. 12, 1971) (Ahearn, Arbitrator), the arbitrator awarded reinstatement because reliance on a possibly unrepresentative and biased sample of student opinion "did not afford the grievance (*sic*) due process contemplated in the Agreement and therefore acted arbitrarily in terminating his employment." *Id.* at 22. He did not award back pay since the administration "established grounds . . . which would have been sufficient to sustain the termination of a probationary employee but for its denial of due process . . . ." *Id.* Similarly, in Oakland Community College v. Oakland Community College Faculty Ass'n, 58 Lab. Arb. 316 (1972) (McCormick, Arbitrator), where the arbitrator adopted a "just cause" standard in reviewing what was essentially a late notice of nonrenewal, he ordered reinstatement and tenure but not back pay. "This award will preserve grievant's future in the academic profession, relief which justice requires, but will effectively serve as notice that he cannot freely resume his former class attendance pattern without risking future sanctions by the College." *Id.* at 319. *See also* Jackson Community College v. Jackson Faculty Ass'n (Dec. 20, 1974) (Roumell, Arbitrator) (holding the failure to consult with the grievant about course scheduling was error and awarding him a choice of future rescheduling even though it was not at all certain that the earlier required consultations would have given him the schedule he preferred).

134. Board of Higher Educ. of the City of New York v. Legislative Conference, AAA Case No. 1339-0706-70 (Dec. 1, 1970) (Roberts, Arbitrator) [not currently on file].

substantial compliance with the contract's evaluation procedure which required an explicit number of classroom observations and evaluations. Her department's personnel committee reversed its original negative recommendation in view of the error in procedure, but noted that it adhered to its original position on the merits. The college personnel and budget committee reconsidered the matter and confirmed its prior negative judgment.

The arbitrator observed that the university was under an obligation to insure that the employee received the required observations and evaluations so that the departmental and college committees could render an "academic judgment" on the basis of a whole record. Accordingly, he found a gross failure to follow established procedure without reason and thus faced the issue of whether he had the authority to order the grievant reappointed in order to effectuate "compliance with established procedure."[135]

Inasmuch as a reappointment would confer tenure, the administration argued such an order would have the effect of substituting the arbitrator's judgment for the "academic judgment" of the appropriate faculty and administrative bodies, a result prohibited in the *Nota Bene*. The arbitrator reasoned, however, that remand without reappointment would be meaningless; it would not provide redress "for the arbitrary denial of her procedural rights that clearly are substantive."[136] "This conclusion," the arbitrator observed, "was reached after much agonizing over the consequences of this award and its impact on the University's committee system that jealously guards its standard of excellence in the grant of tenure."[137] To accede to the university's position would result, he concluded, in providing "no antidote to the wronged and to liberate the wrongdoer."[138] The university still had available a proceeding to terminate for cause which, while placing a far greater burden on the administration, is, he observed, "of the University's own doing."[139]

Similarly, the arbitrator in the Queensborough "coerced" academic judgment case also had to confront the remedial problem.[140] He observed that he lacked authority under the *Nota Bene* to order reinstatement in a case involving an arbitrary use of procedure. On the other hand, he noted that in remanding for procedural compliance he did have authority to determine what procedures must be complied with in order to conform to the agreement. He noted also that a remand for reconsideration prior to the contractual date for notice of nonrenewal can result in a timely corrective review. A reconsideration after that date, however, would be ineffective inasmuch as the board was required to award tenure if the notice date had

135. *Id.* at 20.
136. *Id.* at 20-21.
137. *Id.* at 22.
138. *Id.*
139. *Id.* The appellate division later denied enforcement of the award by a 3-2 vote on the theory that the order exceeded the arbitrator's authority. Legislative Conf. of the City Univ. of New York v. Board of Higher Educ., 38 App. Div. 2d 478, 330 N.Y.S.2d 688 (1972). The court of appeals affirmed, 31 N.Y.2d 926, 293 N.E.2d 93, 340 N.Y.S.2d 924 (1972) (per curiam), accepting the administration's offer of an additional probationary year during which a procedurally sound evaluation would be made.
140. Board of Higher Educ. of the City of New York v. Legislative Conference, AAA Case No. 1330-0090-71 (Jan. 25, 1972) (Friedman, Arbitrator).

passed and *valid* notice of nonrenewal had not been given. Accordingly, without awarding reinstatement (and tenure) the arbitrator ordered reinstatement of the earlier (valid) affirmative recommendation for tenure, the inclusion of the grievant's name in the chancellor recommended list to the governing board *nunc pro tunc*, rescission of the invalid letter of nonrenewal, and "recognition" that valid notice of nonrenewal was not provided. Thus, by operation of law and not by arbitral action, according to the arbitrator's reasoning, the grievant had achieved tenure indirectly where the arbitrator was seemingly prohibited from accomplishing it directly.

These cases stand in sharp contrast to the conclusion in a case concerning the failure to promote a counselor in a community college in Michigan.[141] The contract set criteria for promotion, provided for the submission of a self-evaluation and an evaluation conference, and required the provision of reasons should promotion be denied. The grievant was not recommended for promotion, and after raising both substantive and procedural issues was re-evaluated and affirmatively recommended. The college administration had, however, placed a limitation on the number of promotions to be awarded and accepted the first four names on the list submitted for that department, rejecting the last three, one of which was the grievant's.

The arbitrator found that the grievant's superior had no more information at the time of the second evaluation than before, and concluded that the superior had apparently simply changed his mind. While the arbitrator agreed with the college that a recommendation based on evaluation is basically subjective, he found that where criteria are not actually considered the propriety of the judgment is called in question. He concluded that the grievant's superior failed to conduct the evaluation properly and should have made a favorable recommendation in the first instance. The arbitrator declined, however, to award damages or the promotion because of the uncertainty in light of the board's limitation on the number of promotions that had the grievant been recommended initially she would in fact have been promoted. However, in the second Onondaga Community College case the arbitrator failed to "detect a rational basis to support the trustees' selection for promotion" of fourteen of thirty-five candidates recommended to it by a faculty committee. Thus, he ordered all those above the lowest rated by the faculty and approved by the trustees[142] to be promoted.

In sum, differing arbitral attitudes are reflected in the willingness to fashion remedies. The speculative character of "what would have happened" which was so persuasive to the arbitrator in the Michigan case seems in the other awards to be outweighed by the impact of the decision on future conduct. Equally speculative in the Brooklyn College case was the question of whether tenure would have been confirmed had the university adhered to the procedure. The arbitrator was persuaded by the failure to apprise the

141. Macomb County Community College Faculty Org'n v. Macomb County Community College, AAA Case No. 5439-0139-70 (Nov. 10, 1970) (Casselman, Arbitrator).

142. Onondaga Community College Fed'n of Teachers Local 1845 v. Onondaga Community College, AAA Case No. 15-37-0151-73 (Sept. 14, 1973) (Dennis, Arbitrator).

grievant through the evaluation procedure of her weaknesses or of other criticism. This assumes that the absence of such counseling disadvantaged the grievant in competing for tenure, a result which could not be remedied merely by a pro forma but procedurally correct evaluation on remand. In view of the limitation on arbitral authority in the CUNY agreement the arbitrator's identification of the evaluation procedure as a substantive right in order to award a reinstatement for breach is noteworthy. Interestingly, while the arbitrator in the Michigan case was apparently willing to hear evidence not produced by the faculty organization, that objective criteria would establish that the grievant's promotion would have been granted, the arbitrator in the Brooklyn College case precluded a consideration of testimony concerning the grievant's academic competence, training, and experience due precisely to the limitation on the scope of his jurisdiction contained in the *Nota Bene.*

Indeed, given the prior actions of the chancellor and CUNY committee in the Queensborough case, the most reasonable assumption is that the board would have rejected all or many of the president's recommendations had he not reduced them. The award of tenure albeit indirectly in that case seems clearly intended to have a prophylactic effect. On the other hand, the failure to reinstate or award damages in the St. John's case freed the administration to violate its own rules governing suspension and dismissal for reasons violative of academic freedom (which the procedural requirements were designed to protect) so long as such suspension was with pay.

IV. SOME THOUGHTS ON ACCOMMODATING ARBITRATION TO HIGHER EDUCATION

This study of faculty status arbitration has revealed a variety of arbitral approaches and results dealing with similar problems and often under similar contractual provisions. To be sure, these awards reflect arbitration's earliest encounter with higher education. Greater experience may yield a clearer picture of the effects of alternative approaches and suggest other possibilities. As the parties to collective agreements and the arbitrators become more experienced, a more coherent body of arbitral doctrine may emerge.[143] In anticipation of that development, however, the shape of such a system may be discerned. A fuller articulation necessitates a separate discussion of arbitral standards and arbitral selection and education.

Arbitral Standards. Given the untenability of the procedure-substance dichotomy or the "academic judgment" exemption, arbitral standards will have to allow unapologetically for consideration of the merits of faculty status decisions; this in turn should lessen the pressure for procedural over-elaboration. A significant problem is whether standards can be fashioned so as to avoid de novo arbitral judgments which the arbitration process is ill-suited to make.[144] The better approach is to view the arbitrator's role

143. J. Weisberger, *supra* note 4, at 42.

144. One could, for example, devise an hypothetical "arbitration" system in which a panel of leading scholars in a faculty member's discipline is selected jointly by the

as analogous to that of a court on review of administrative agency action; he is not to make his own determination of the grievant's competence, qualifications, or conduct, but is to decide whether the decision-makers stayed within the bounds contemplated by the collective agreement and other governing instruments. Thus, the arbitrator should have authority to determine whether the challenged decision was substantially affected by a procedural error (including departures from institutional governance policies), was based significantly on proscribed considerations (*e.g.*, violation of academic freedom), or was otherwise arbitrary or an abuse of discretion, *i.e.*, whether the decision was one which on the basis of the information before them academics in the position of the decision makers could reasonably have made. In order to make an informed decision, the arbitrator should be expected to draw heavily on academic custom, practice, and usage.

The proposed arbitral standards are no doubt subject to the criticism which any arbitration system would confront: they inject the arbitrator into the substance of academic decision-making. Further, the availability of review dampens the ability of the faculty or administration to make negative decisions in difficult or borderline cases. Nevertheless, if arbitration is adopted some candid consideration of the merits is unavoidable for the grievance procedure to be successful. Moreover, the substitution of adjudication for internal political suasion perforce substitutes an appeal to legalism for the more flexible appeal to a sense of community values. The question is whether, in an era where appeal to such values may have a lessened impact on many campuses, a system of adjudication can be fashioned which builds on the institution's governance system and the reasons in support of it.[145] This review of the arbitral experience suggests that the proposed standard, coupled with great care in arbitral selection and education, has the greatest potential for adapting successfully to the academic milieu. Furthermore, the system of governance would be buttressed, and the pressure on the arbitrator to substitute his judgment de novo is lessened, by joining to the proposed standard a heavy presumption in favor of the soundness of peer judgment, *i.e.*, the very foundation upon which the system of faculty

---

faculty and administration. The panel would hear from faculty, students, and administration concerning teaching and research ability, projected usefulness to the program, ability to work well in the institution, and the like. It would assess the candidate's published work, interview him on projected research, and issue a decision on reappointment, promotion, or tenure. It is the personal competence of the panel members, however, and not the process which gives the result legitimacy. Indeed the adjudicatory format is particularly ill-suited for this kind of decision. Moreover, it should be noted that the hypothetical panel would function much like the peer review process.

145. It should be stressed again that there is a broad spectrum of types of institution. As a leading study reported:

> Particularly relevant . . . is the fact that faculty power and professional independence vary with the quality of the school. The higher its academic standing, the more the institution resembles a professional guild; further down the hierarchy, colleges take on the characteristics of regular bureaucratic structures, with the 'higher-ups' in charge.

E. LADD & S. LIPSET, PROFESSORS, UNIONS, AND AMERICAN HIGHER EDUCATION 98 (1973). Accordingly, the proposals advanced here have little relevance for either elite universities or "public school" minded colleges. These proposals are relevant for the vast middle range of institutions which espouse, or aspire to maintain, an academic government but lack the *Gemeinschaft* characteristic of the mature university.

participation is based. Thus, the grievant would have to show, assuming procedural compliance and the absence of improper considerations, that no reasonable group of academics could have arrived at the judgment challenged given the data and criteria at hand. The presumption should carry over where the grievant challenges administrative reversal of an affirmative faculty recommendation. Here the burden would rest on the administration to show compelling reasons for and the facts underpinning its decision.[146] Finally, the arbitrator must have broad remedial power for the system to be effective.

Arbitral Selection and Education. While arbitral standards clearly affect the outcome, this study suggests that the outcome is considerably affected by the competence of the arbitrator and the assumptions he brings to bear in the disposition of the case. Thus, it has been proposed that one means of joining arbitration with academic government lies in the "careful choice of arbitrators, to make certain they are aware of and sensitive to the value of academic freedom, and are knowledgeable and understanding of the ways of the academic world."[147] Yet, apart from some experimentation in the CUNY and SUNY systems with standing panels under a single contract,[148] arbitral selection remains a largely ad hoc affair.

One device to obtain more knowledgeable arbitrators is to provide for a tripartite panel consisting of faculty, administration, and a neutral.[149] Such a

146. Allowing review on these grounds requires a full explanation in the arbitration of the procedures, criteria, and data utilized by the faculty in arriving at its decision. However, an arbitrator in one CUNY case held that a policy against the disclosure of the discussions in personnel committees prevented him from ordering a member to testify to those discussions in an arbitration concerning an allegation of sex discrimination. Board of Higher Educ. of the City of New York (City Univ.) v. Legislative Conference, AAA Case No. 1339-1278-72 (Aug. 21, 1973) (procedural ruling), (Oct. 16, 1973) (grievance denied) (Friedman, Arbitrator), *award confirmed*, Professional Staff Congress v. Board of Higher Educ., 87 L.R.R.M. 2399 (N.Y. Sup. Ct. 1974). The arbitrator reasoned that the nondisclosure policy was incorporated into the agreement which the grievance procedure itself would be available to enforce. Moreover, he clearly was troubled by the inhibiting effect that the possibility of such disclosure might have on free debate within collegial bodies. The award is subject to criticism on both grounds. First, institutional policies are incorporated into the collective agreement only insofar as they are not altered by the agreement; the arbitral reasoning is essentially circular. Second, the conclusion is inconsistent with the anti-discrimination provision which, it was noted, was held to withstand attack on "academic judgment" grounds. Thus, it may have the practical effect of foreclosing a challenge based on discrimination by the peer group. Finally, the provision in an arbitration of a full statement of the debate on the individual is clearly distinguishable from improper disclosure in a social setting or from the disclosure of materials secured under a promise of confidentiality, for example, letters from referrants outside the institution. The institutional policy in question seems directed simply to the first situation; the latter can be dealt with by in camera inspection by the arbitrator. In sum, the implied promise of confidentiality of the debate should not extend to prevent the disclosure in a contested case. Curiously, in a later case concerning whether a negative tenure recommendation by a faculty committee was improperly tainted by the administration's efforts to impose a tenure quota, see cases accompanying notes 30-32 *supra*, the arbitrator did entertain, apparently without objection, evidence bearing on the committee's deliberations. Professional Staff Congress/ City Univ. of New York v. Board of Higher Educ. of the City of New York, AAA Case No. 1339-0332-74 (Oct. 26, 1974) (Stein, Arbitrator).

147. Sands, *The Role of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 150, 172.

148. This is discussed more fully in J. Weisberger, *supra* note 4, at 38.

149. *See, e.g.*, Agreement between Wayne State Univ. and the Wayne State Univ. Chapter (AAUP), art. XVII (May 11, 1973); Collective Bargaining Agreement between the Univ. of Delaware and the Univ. of Delaware Chapter, AAUP, art. XV (1973).

structure presumes that the arbitrator will be educated to the nuances of the case not only in its presentation but by debate within the committee as well. Another alternative is to submit faculty status disputes for final determination to a purely internal faculty-administration agency, as a few agreements do in instances of dispute between the administration and the peer group.[150] While this device has considerable advantages in assuring an informed "in house" decision, the very proximity of the participants to the disputants may affect the degree of objectivity expected to be brought to bear in governance controversies; in that sense it is partly adjudicative and partly political, which makes for an interesting mixture of arbitration and traditional institutional processes.

To the extent that arbitrators will continue to be selected on an ad hoc basis, the academic community would be well served if the leading organization of administration and faculty nominated standing panels of arbitrators widely experienced in academic affairs for geographic areas where collective bargaining seems particularly prevalent. Indeed, these arbitrators could be used to resolve faculty status disputes wholly outside the context of collective bargaining, either by ad hoc agreement in particular cases or by institutional regulatory provisions as a substitute for litigation. While a corps of able and academically experienced arbitrators may evolve by a process of natural selection,[151] there is considerable utility in hastening its development.

A second aspect of arbitral education lies in the extent to which reliance is placed on arbitration awards and other sources as representing a body of applicable doctrine or authority.[152] One means of reducing the ad hoc character of arbitral judgments is to assure that most faculty status arbitration awards are published by a central agency, conceivably the consortium of faculty and administration organizations suggested above. This would facilitate empirical research in the actual impact of various arbitral approaches or results as well as analysis and criticism of a textual nature. Moreover, the proposed arbitral standard is intended to minimize the pressure toward ever-expanding contractual elaboration. This in turn implies that the refinement of the standard will be supplied by a body of arbitral case law. It follows that the academic community would be benefited by assuring the widespread availability of arbitration awards. In addition, the proposed consortium could itself commission further investigations and sponsor other programs for academic arbitrators (and their clients) in conjunction, perhaps, with its listing procedure. Thus, without establishing a national judiciary for higher education disputes, as some have suggested,[153] the adoption of uniform arbitral standards and the creation of an agency exercising a degree

150. *See, e.g.*, Agreement between Hofstra Univ. and Hofstra Univ. Chapter, AAUP, arts. III, V, VI (Jan. 11, 1974); Agreement between Temple Univ. and AAUP, arts. VI, VII, XIV (effective July 1973).

151. *See* J. Weisberger, *supra* note 4, at 38.

152. To some extent this may be a function of the amount of time counsel can spend in the preparation of the case and the kind of material submitted to the arbitrator to place the dispute in context. Curiously, the relative swiftness and informality of an arbitration and "contract focus" of the proceeding may not be an advantage.

153. *See* Hobbs, *An Academic Dispute—Settlement Commission: A Proposal*, 52 EDUC. RECORD, Spring 1971, at 181, proposing an ad hoc arbitration board be established

of oversight in arbitral selection and work product may reduce the likelihood that widely shared principles of academic freedom and faculty governance will become eroded in the Balkanized world of collective agreement and ad hoc arbitration.[154]

by legislation as an all-purpose dispute resolver in higher education, not merely for faculty status issues. *See also* R. O'NEIL, THE COURTS, GOVERNMENT AND HIGHER EDUCATION 39 (1972) (proposing a court for academic disputes).

154. An award issued after this Article had been sent to the printer reinforces the conclusions drawn in the text. In it, Arbitrator Archibald Cox was called on to decide the permissibility of a policy adopted by the University of Bridgeport which attempted to limit, due to financial conditions, all new appointees to one-year, special and thus non- "tenure track" appointments. American Association of University Professors (University of Bridgeport Chapter) v. University of Bridgeport, AAA Case No. 1239-0162-75 (May 3, 1976) (Cox, Arbitrator). The collective agreement contained a management rights clause. However, it also incorporated AAUP standards governing probation and tenure. Arbitrator Cox held that to the extent the policy attempted to exempt new appointments from the applicable probationary period it fell afoul of the incorporated standards, *i.e.*, the university could not unilaterally create a new category of faculty appointment which would never be tenure eligible no matter how long the individual was kept on. Thus far the award evidences that an able and academically knowledgeable arbitrator given contractual standards incorporating widely shared norms of academic practice will achieve a result fully in keeping with the character of the enterprise. However, the award goes on to observe that, "Nothing in the collective bargaining agreement can fairly be read to preclude warning a new non-tenured teacher that he or she must realize that the appointment does not carry even the ordinary non-contractual expectation that good performance will lead to renewal." *Id.* at 3. While chastising the parties for their failure to have worked out an agreeable settlement, Arbitrator Cox suggests that the faculty would have acquiesced to the issuance of a "blunt warning" to "each new appointee . . . that he would not have even the customary hope of renewal upon good performance." *Id.* at 5. Thus, in dictum the arbitrator would seem to permit the institution, as an exercise of its management prerogative without faculty consultation of any kind, to limit *all* new appointments to a special, temporary or visiting category without encountering any difficulty under the collective agreement or the academic norms incorporated by it. To that extent it is more akin to the "industrial" line of cases. Indeed the arbitrator consistently views the dispute as a practical one which could and should have been solved pragmatically without raising questions of principle. This is, of course, consistent with the notion of an arbitrator as a labor relations physician. In that sense, then, an able judge, performing a public function, removed from any personal responsibilities to the parties, and perforce concerned with binding principle may be in a rather different position in deciding hard cases. *See, e.g.*, American Association of University Professors (Bloomfield College Chapter) v. Bloomfield College, 322 A.2d 846 (N.J. Super. 1974). This suggests that to the extent overarching principles are considered important the academic community will have to devise some means beyond the language of the contract and the selection of able arbitrators for assuring fidelity to them.